591

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~115~~ 173

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

JULIA ARMSTRONG, ADMINISTRATRIX OF JOHN M. ARMSTRONG, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED NOVEMBER 21, 1882.

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1 *Summons.*

COUNTY OF KINGS.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, deceased, Plaintiff,
against
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

Trial to be had in the County of Kings.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, March 25, 1880.

GEORGE M. MACKELLAR,
Pl'ff's Att'y.

P. O. address and office No. 154 Nassau street, New York.

2 Supreme Court, County of Kings.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, Deceased,
against
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Trial to be had in the County of Kings.

The plaintiff, on information and belief, complains:

First. That during all the times hereinafter mentioned the defendant was, and now is, a corporation duly created and organized under and by virtue of the laws of the State of New York for the purpose of insuring lives.

Second. That on or about the 8th day of December, 1877, at the city of Philadelphia, in the State of Pennsylvania, in consid-
3 eration among other things of the payment then and there made of the sum of one hundred and thirty-eight dollars and sixty cents ($138.60), and of the payment of the like sum to be made at divers several times thereafter, the defendant, by its agents and officers duly authorized thereto, made and delivered to said John M. Armstrong its certain policy of insurance in writing, a copy of which is hereunto annexed, marked Exhibit A, and is made a part of this complaint, and thereby insured the life of said John M. Armstrong in and for the sum of ten thousand (10,000) dollars, payable after his death to his legal representatives.

Third. That on or about the 25th day of January, 1878, at said city of Philadelphia, the said John M. Armstrong died, but not in consequence of a duel, or of the violation of law, or by disease, vio-

lence, or accident brought about by intoxication, or by self-
4 destruction, voluntary or involuntary, or by any of the causes of death by said policy excepted from risk by the defendant.

Fourth. That thereafter, and on or about the 25th day of March, 1880, at the city of New York, letters of administration of the goods, chattels, and credits of the said John M. Armstrong, deceased, were duly issued and granted unto this plaintiff by the Honorable Delano C. Calvin, surrogate of the county of New York; that this plaintiff was thereby duly appointed the administratrix of the goods, chattels, and credits of said John M. Armstrong, deceased, and that this plaintiff thereupon duly qualified as such administratrix, and assumed and still continues in the duties of the office of such administratrix.

5 Fifth. That said John M. Armstrong and this plaintiff each duly fulfilled all the conditions of said policy and the insurance effected thereby on their part respectively.

Sixth. That on or about the 25th day of January, 1879, this plaintiff duly furnished and delivered to the defendant the certain notice and proofs of such death of the said John M. Armstrong, described in and required by said policy.

Seventh. That this plaintiff has demanded from the defendant the sum of nine thousand five hundred and eighty-four dollars and twenty cents ($9,584.20), with interest thereon from the 25th day of January, 1879, but that the defendant has not at any time paid to this plaintiff said last-named sum, nor any part thereof.

6 Wherefore this plaintiff demands judgment against the defendant for said sum of nine thousand five hundred and eighty-four dollars and twenty cents ($9,584.20), with interest thereon from the 25th day of January, 1879, and the costs of this action.

GEORGE M. MacKELLAR,
Plaintiff's Attorney,
Tribune Building, New York.

CITY AND COUNTY OF NEW YORK, *ss:*

George M. MacKellar, being duly sworn, says:

I am the plaintiff's attorney in this action. The foregoing complaint is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The reason why this verification is not made by the plaintiff in this action are that the plaintiff is not within the county of
7 Richmond, which is the county where I reside, and is not within the county of New York, in which my office is, but is, as I am informed and believe, in the city of Philadelphia, in the State of Pennsylvania, and that this action is founded on a written instrument for the payment of money only; which said instrument is now in my possession.

The sources of my knowledge and the grounds of my belief are said instrument, the letters of administration in said complaint mentioned, which are now in my possession, verified proofs of the

death of John M. Armstrong, and statements made to me in behalf of the plaintiff by persons cognizant of the facts stated in said complaint.

GEORGE M. MacKELLAR.

Sworn to before me, this 25th day of March, 1880.

B. I. DOURAS,
Notary Public, N. Y. Co.

8 *Exhibit A, referred to in foregoing Complaint.*

Endorsement: No. 187427. Age, 41 years. Amount, $10,000. Quarter annual premium, $138.60.

The Mutual Life Insurance Company of New York in consideration of the application for this policy of insurance, which is hereby referred to and made a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in this contract hereby adopts as his own, admits to be material and warrants to be full and true, and to be the only statements upon which this contract is made, and in further consideration of the payment of the sum of one hundred and thirty-eight dollars and sixty cents at the home office of the company, at the date hereof, to be evinced by the receipt of the company, and of the payment of the like sum, to be
9 made at the said office on or before the eighth day of December, March, June, and September in every year during the continuance of this contract, does promise to pay to John M. Armstrong, of Philadelphia, Penna., his assigns, on the eighth day of December, in the year 1897, the sum of ten thousand dollars (any indebtedness to the company on account of this contract to be first deducted therefrom,) at the office of the company, in the city of New York, or if he should die before that time, then to make said payment to his legal representatives within sixty days after notice and the proofs hereinafter required of the death of said John M. Armstrong shall have been furnished to the company at its said office, upon the following conditions:

I. If any statement made in the application for this policy be in any respect untrue, the consideration of this contract shall
10 be deemed to have failed, and the company shall be without liability under it.

Express condition and agreement that the said party whose life is hereby insured shall always wear a suitable truss.

II. If any premium or instalment of premium on this policy shall not be paid when due the consideration of this contract shall be deemed to have failed and the company shall be released from liability, and the only evidence of payment shall be the receipt of the company signed by the president or secretary.

III. If the said person upon whose death this policy matures shall die in consequence of a duel, or of the violation of law, or by disease, violence, or accident, brought about by intoxication, or shall impair his health by narcotics or alcoholic stimulants, or shall have

delirium tremens, or if without the written consent of the company, signed by the president or secretary thereof, he shall pass or remain beyond the limits of residence, and travel, or shall personally
11 engage in any of the occupations or employments which are specified on the back of this policy, the company shall be released from all liability on account of this contract.

IV. It is hereby declared and agreed the self-destruction of the person, whether voluntary or involuntary, whether he be sane or insane at the time, is not a risk assumed by the company in this contract, but in every such case the company will, upon demand made and the surrender of this policy, accompanied with satisfactory proofs of such death within sixty days after its occurrence, pay the net reserve upon it held by the company at the beginning of the year in which death occurs, calculated by the present legal standard of the State of New York, first deducting therefrom any indebtedness which shall have accrued to the company on account of this contract.

12 V. The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose will not be delegated. And it is further declared and agreed that in case the obligation of the company under this contract be defeated by the failure of any of the considerations, or by the violation of any of [the] covenants or conditions recited or referred to herein, all payments which shall have been made to the company on account of this contract shall be forfeited to the company.

VI. The proofs of the death by which this contract matures shall be furnished to the company within one year after such
13 death, and shall contain full and true answers, under oath to the questions in the company's blanks for proofs of death relating to the life, health, and death of the person in question, and shall include (1) a statement of the extent and character of each and every claimant's interest in the policy; (2) the statement of the physician or physicians, if more than one, who attended the deceased during his last illness or within a year previous; (3) the statement of a responsible householder acquainted with the deceased; (4) the statement of the undertaker. If any of these statements be omitted the necessity of the omission must be established, and further proofs satisfactory to the company must be furnished, nor shall any suit against the company under this contract be brought or action commenced after one year from the time when the right of action accrues; and, if any such action or suit be brought after that time, the lapse of time shall be conclusive evidence against the claim.

14 VII. The provisions and requirements printed by the company upon the back of this policy are hereby referred to and accepted as part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof, the said The Mutual Life Insurance Company

of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the eighth day of December, A. D. one thousand eight hundred and seventy-seven.

RICHARD W. McCURDY,
Vice-President.

ISAAC F. LLOYD, *Secretary.*

The following is printed on the back of this policy:

Provisions and Requirements referred to in this Policy.

Limits of residence and travel.

The limits of travel and residence allowed under this contract include those parts of the settled limits of the United States
15 and British possessions which lie between the parallels of 50° and 36° 30′ north latitude; also, that part of Tennessee which lies east of the Tennessee river; also, those parts of Alabama, Georgia, South Carolina, and North Carolina which lie north of the parallel of 34° north latitude, and at the same time more than 100 miles from the Atlantic coast; also, places within fifty miles of Atlanta, Georgia; also, the settled limits of the United States which lie west of the meridian 100° west longitude, and at the same time north of the parallel 32° north latitude; also, all the settled limits of the United States which lie west of the 109th meridian of west longitude, except Alaska; also after November 1st and before July 1st in any calendar year those parts of the settled limits of the United States which lie south of the parallel of 36° 30′ north latitude.

Travel is permitted in first-class vessels by direct route along the coast of the United States and the British North American
16 possession, provided no part is entered not includedat the time in the limits above allowed for travel and residence.

But travel and residence of the person at whose death this contract matures, beyond the above limits or at other seasons than are above stated, will release the company from all liability under this contract.

Occupations and employments.

The occupations and employments, engagement in which will release the company from all liability under this contract, are blasting, mining, submarine labor, aeronaut travel and excursions, the manufacture, handling, or transportation of inflammable or explosive substances, service upon any railroad, steamboat, or other vessel or boat, military and naval service of every kind, whether as combatant or non-combatant, the militia in time of peace excepted.

Provisions for payment of premiums—payment of premiums.

All premiums are due at the office of the company, in the
17 city of New York, at the date named in the policy; but, at the pleasure of the company, suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt therefor, signed by the president

or secretary. No payment made to any person, except in exchange for such receipt, will be recognized by the company.

Commencement of assurance year and balance of year's premium.

All premiums are payable annually in advance. When the premium is made payable in semi-annual or quarterly installments that part of the year's premium, if any, which remains unpaid at the maturity of this contract shall be regarded as an indebtedness to the company on account of this contract, and shall be deducted from the amount of the claim, and if any such payment be
18 not made on or before the day it is due the company shall from that day be released from all liability under this contract, and no credit for surplus accumulated upon this policy shall be deemed applicable to the payment of any premium unless the previous consent of the company be obtained in writing.

Presumption of death.

No presumption of death shall arise from disappearance until this policy shall have been maintained in force by the payment of premiums throughout the expectation of life of the person upon whose death this contract matures, according to the company's table of mortality reconed from the date of the policy.

Assignments.

This company will not take notice of any assignment of this policy until a duplicate or a certified copy thereof shall be delivered to the company at its principal office, and under no circumstances will the company assume any responsibility for the validity of such
19 assignment. If any claim be made under an assignment, proof of interest to the extent of the claim will be required.

Paid up insurance.

After one payment of premiums for two full years the company will, if requested, and on the surrender of this policy duly receipted, issue another policy on the life of the person whose life is insured by this policy, payable as above provided, on which no further premium shall be required, and the amount of which shall equal the sum which the net reserve will purchase, increased by the reversionary credits for overpayments, at the time of exchange: Provided, Application for said paid-up policy be made while this policy is in force, or within sixty days after its lapse.

ISAAC F. LLOYD, *Secretary.*

20 Know all men by these presents that I, William MacKellar, of the town of Northfield, county of Richmond, and State of New York, am *are* held and firmly bound unto The Mutual Life Insurance Company of New York in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said The Mutual Life Insurance Company of New York or to its successors or assigns; for which payment, well and truly to be

made, I do bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal, dated the eighth day of April, in the year one thousand eight hundred and eighty.

Whereas Julia Armstrong, administratrix of the goods, chattels, and credits of John M. Armstrong, deceased, has commenced an action in the supreme court of the State of New York against the said The Mutual Insurance Company of New York:

21 Now, the condition of the above obligation is such, that if the above-named William MacKellar shall pay on demand all costs that may be awarded to the defendant in the said action, then the above obligation to be void; otherwise to remain in full force and virtue.

WM. MACKELLAR. [L. S.]

Sealed and delivered in presence of—
H. T. KETCHAM.

CITY AND COUNTY OF NEW YORK, *ss:*

William MacKellar, the surety in the within bond, being duly affirmed, says: That he is a resident and freeholder in the State of New York and is worth five hundred dollars over and above all debts, dues, demands, and encumbrances whatever, besides property exempt by law from execution.

Affirmed before me, this 8th day of April, 1880.

H. T. KETCHAM,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

22 CITY AND COUNTY OF NEW YORK, *ss:*

I hereby certify that before me personally came William MacKellar, known to me to be the individual described in and who executed the within bond, and severally acknowledged that he executed the same.

H. F. KETCHAM,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

23 *Notice of Appearance and Demand.*

New York Supreme Court, County of Kings.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, Deceased,
against
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Please to take notice that we are retained by and appear for the Mutual Life Insurance Company of New York, the defendant in this

action, and demand that all papers in said action be served on us at our office, No. 52 Wall street, New York city.

Dated New York, April 14, 1880.

Yours, &c., EVARTS, SOUTHMAYD & CHOATE,
Attorneys for Defendant.

Office address, No. 52 Wall street; Post office address, New York city.

To George M. MacKellar, Esq., attorney for pl'ff.

24 *Affidavit of Merits.*

N. Y. Supreme Court, Kings County.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, Deceased,
against
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

CITY AND COUNTY OF NEW YORK, *ss:*

F. S. Winston, of said city, being duly sworn, deposes and says: That he is president of the defendant in the above-entitled action; that he has fully and fairly stated the case in the above action to Joseph H. Choate, Esq., defendant's counsel in this action, who resides in the said city of New York; and that defendant has a good and substantial defence upon the merits thereof, as he is advised by said counsel after such statement made as aforesaid, and verily believes it to be true.

F. S. WINSTON, *Pr.*

Sworn to before me, this 13th day of April, 1880.
WILLIAM G. DAVIS,
Notary Public.

25 To the honorable the supreme court of the State of New York in and for the county of Kings:

The petition of The Mutual Life Insurance Company of New York, a corporation created and organized under and by virtue of the laws of the State of New York, respectfully showeth:

That heretofore and on or about the twenty-fifth day of March, 1880, a suit of a civil nature at law was brought in this court by Julia Armstrong, as administratrix of the goods, chattels, and credits of John M. Armstrong, deceased, as plaintiff, against your petitioner, as defendant; that the said Julia Armstrong, at the time of the commencement of said suit, was, and has ever since been, and now is, citizen of, and resident in, the State of Pennsylvania, residing in the city of Philadelphia, in said State, and that John M.

26 Armstrong, the intestate of said Julia Armstrong and the person mentioned in the complaint and the copy of the alleged policy of insurance annexed to said complaint, was, at and for five years prior to the time of his death, a citizen of, and resident in, said State of Pennsylvania, at Philadelphia, in said State; that your petitioner, at the time of the commencement of said suit, was, and has ever since been, and now is, a corporation

created and existing under and by virtue of the laws of the State of New York, and a citizen of, and resident in, said State of New York, having its principal office or place of business in the city of New York; that said suit was brought for the recovery by the plaintiff against your petitioner of the sum of nine thousand five hundred and eighty-four dollars and twenty cents, with interest thereon from the twenty-fifth day of January, 1879, and the costs of this action, as stated and set forth in the complaint therein; that your
27 petitioner denies any liability for the said sum or any part thereof; that the said suit is a suit of a civil nature at law, in which there is a controversy between citizens of different States, to wit, between a citizen of the State of Pennsylvania and a citizen of the State of New York, and that the matter in dispute in said suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that there has been no trial of said suit, nor any term at which the same could be tried, but that the time of your petitioner to answer the complaint in said suit is still unexpired, and that the said suit is still pending, undetermined in this court.

Wherefore your petitioner prays for the removal of said suit into the circuit court of the United States, to be held in the district where such suit is pending, to wit, into the circuit court of the United States for the eastern district of New York, in the second circuit, and makes and files with this petition a bond with good
28 and sufficient surety for its entering in such circuit court, on the first day of its next session, a copy of the record in said suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and also for its there appearing and entering special bail in such suit, if special bail was originally requisite therein.

And your petitioner prays this honorable court to accept said petition and bond, and proceed no further in such suit. And your petitioner will ever pray, &c.

(S'g'd) F. S. WINSTON, *Pres't.*
(S'g'd) ISAAC F. LLOYD, *Sec'y.*
[Corporate seal.]

CITY AND COUNTY OF NEW YORK, *ss:*

29 F. S. Winston, of said city, being duly sworn, deposes and says: That he is the president of the Mutual Life Insurance Company of New York, the petitioner described in, and which has executed the foregoing petition; that he has read the said petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. And further saith not.

(S'g'd) F. S. WINSTON.

Sworn to before me, this 13th day of April, 1880.

WILLIAM G. DAVIES,
Notary Public, 54.

[Notarial seal.]

30 Know all men by these presents that we, The Mutual Life Insurance Company of New York, as principal, and F. S. Winston and George H. Andrews, both of New York city, as sureties, are held and firmly bound unto Julia Armstrong, as administratrix of the goods, chattels, and credits of John M. Armstrong, deceased, her successors and assigns, in the sum of one thousand dollars, lawful money of the United States, to be paid to the said Julia Armstrong, administratrix as aforesaid, her successors or assigns; for which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals this thirteenth day of April, one thousand eight hundred and eighty.

Whereas the above-named Julia Armstrong, as administratrix of the goods, chattels, and credits of John M. Armstrong, de-
31 ceased, has heretofore and on or about the twenty-fifth day of March, 1880, brought a suit, of a civil nature at law, in the supreme court of the State of New York, in and for the county of Kings, against the said The Mutual Life Insurance Company of New York, which suit is still pending and undetermined;

And whereas the said The Mutual Life Insurance Company of New York intends, simultaneously with the filing of this bond, to file its petition in the said suit in such State court for the removal of such suit into the circuit court of the United States to be held in the district where such suit is pending, to wit, the circuit court of the United States for the eastern district of New York in the second circuit, according to the provisions of the acts of Congress in that behalf:

Now, therefore, the condition of this obligation is such that if the said petitioner, The Mutual Life Insurance Company of New
32 York, shall enter in the said circuit court of the United States for said eastern district of New York, on the first day of its next session, a copy of the record in such suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also there appear and enter special bail in such suit if special bail was originally requisite therein, then the above obligation shall be void, but shall otherwise remain in full force and virtue.

F. S. WINSTON. [SEAL.]
GEORGE H. ANDREWS. [SEAL.]

F. S. WINSTON, *Pr.*
ISAAC LLOYD, *Sec'y.*
[Corporate seal.]

In presence of—

——— ———.

CITY AND COUNTY OF NEW YORK, *ss:*

I, William G. Davies, a notary public in and for the said city and county of New York, in the State of New York, duly commissioned and sworn and dwelling in said city, do hereby certify that

33 on this thirteenth day of April, in the year one thusand eight hundred and eighty, before me, personally came F. S. Winston, of said city, the president of the Mutual Life Insurance Company of New York, with whom I am personally acquainted, who, being by me duly sworn, did depose and say: That he was the president of the said company; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed thereto by order and direction of the board of directors of the said company, and that he thereupon, by the like order and direction, subscribed his name thereto as such.

In witness whereof, I have hereunto set my hand and affixed my official seal, at the city of New York, this thirteenth day of April, one thousand eight hundred and eighty.

WILLIAM G. DAVIES,
Notary Public, 54.

[Notarial seal.]

34 CITY AND COUNTY OF NEW YORK, *ss:*

F. S. Winston, one of the obligors named in the foregoing obligation, being duly sworn, deposes and says: That he resides at No. 18 West 31st street, New York city, in the State of New York; that he is a freeholder in said State; that he is worth the sum of two thousand dollars over and above all his debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution. And further saith not.

F. S. WINSTON.

Sworn to before me, this 13th day of April, 1880.

WILLIAM G. DAVIES,
Notary Public, 54.

[Notarial seal.]

CITY AND COUNTY OF NEW YORK, *ss:*

George H. Andrews, one of the obligors named in the foregoing obligation, being duly sworn, deposes and says: That he resides at No. 151 Second ave., New York city, in the State of New York; that
35 he is a freeholder in said State; that he is worth the sum of two thousand dollars over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution. And further saith not.

GEO. H. ANDREWS.

Sworn to before me, this 13th day of April, 1880.

WILLIAM G. DAVIES,
Notary Public, 54.

[Notarial seal.]

CITY AND COUNTY OF NEW YORK, *ss:*

On this thirteenth day of April, eighteen hundred and eighty, before me personally came and appeared F. S. Winston and George

H. Andrews, above named, known to me to be the same persons described in and who executed the foregoing instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and seal
36 this thirteenth day of April, 1880.

WILLIAM G. DAVIES,
Notary Public.

[Notarial seal.]

37 At a special term of the supreme court of the State of New York for the county of Kings, held at the court-house, in the city of Brooklyn, on the 14th day of April, eighteen hundred and eighty.

Present: Hon. E. Cooke, justice.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, Deceased,
against
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Upon the summons and complaint in the above-entitled action, and the petition of the defendant in said action for the removal thereof into the United States circuit court for the eastern district of New York, which petition was this day presented to and filed
38 in this court, and the bond of said defendant as principal and F. S. Winston and George H. Andrews as sureties, which said bond was this day presented to and filed in this court with said petition, and upon the affidavit of merits and the affidavit of A. W. Evarts, hereunto annexed.

Let the plaintiff or her attorney in said action show cause before this court, at a special term thereof, to be held in the court-rooms of said court, in the city of Brooklyn, on the 24th day of April, 1880, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the prayer of said petition should not be granted, and why the said defendant should not have such other and further order or relief in the premises as may be proper.

And I do further order that the time of the said defendant to answer the complaint of the plaintiff in said action be, and the same is hereby, extended until ten days after the service upon the
39 attorney for said defendant of the order which may be entered upon the decision of the application to be made under this order.

Service of this order on or before the 16th day of April shall be sufficient service thereof.

E. COOKE, *J.*

40 N. Y. Supreme Court, Kings County.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, deceased,
against
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

CITY AND COUNTY OF NEW YORK, *ss:*

A. W. Evarts, being duly sworn, deposes and says: That he is one

of the attorneys for the defendant in the above-entitled action; that the summons and a copy of the complaint in said action were served upon the defendant on the 25th day of March, 1880; that the time of the defendant to answer the said complaint has not yet expired, but will expire on the 14th day of April, 1880, and that no extension of such time has been granted by stipulation or order;
41 that the defendant is about filing a petition for the removal of said action into the United States circuit court for the eastern district of New York and desires an extension of the time to answer until after the determination of its application for such removal; that there is not sufficient time to give eight days' notice of a motion to remove before the defendant's time to answer expires; for which reason an order to show cause is asked for to shorten the time of such notice.

And deponent further says that no application has been made to any other judge for the order to be applied for in this affidavit.

A. W. EVARTS.

Sworn to before me this 14th day of April, 1880.

WM. CARY SANGER,
Notary Public, Kings County, with Cert. in N. Y. Co.

42 At a special term of the supreme court of the State of New York for the county of Kings, held at the court-house, in the city of Brooklyn, on the twenty-fourth day of April, eighteen hundred and eighty.

Present: Hon. Erastus Cooke, justice.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, deceased,
against
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Upon reading and filing a copy of the complaint in this action and a notice of appearance on behalf of the defendant therein, and the petition of the said defendant, The Mutual Life Insurance Company of New York, praying for the removal of said suit into
43 the circuit court of the United States to be held in the district in which such suit is pending, to wit, into the circuit court of the United States for the eastern district of New York, in the second circuit, pursuant to the acts of Congress of the United States in such case made and provided; and it duly appearing by the said petition, and also by the said complaint herein, to the satisfaction of this court that the present suit is a suit of a civil nature at law, and was brought in this court by the said Julia Armstrong, as administratrix of the goods, chattels, and credits of John M. Armstrong, deceased, who at the time of the commencement thereof was, and has ever since been, and now is, a citizen of and resident in the State of Pennsylvania, as plaintiff, against the said The Mutual Life Insurance Company of New York, which was at the commencement of said suit, and has ever since been, and now is, a
44 corporation created and organized under the laws of the State

of New York, and a citizen of and resident in the said State of New York, and that John M. Armstrong, named in said complaint and in the alleged policy of insurance annexed thereto, was, at and for five years prior to his death, a citizen of the State of Pennsylvania and a resident of Philadelphia, in that State; and it further appearing to the satisfaction of the court, as aforesaid, that the matter in dispute in said suit exceeds, exclusive of costs, the sum or value of five hundred dollars, and that it is a suit in which there is a controversy between citizens of different States, to wit, between a citizen of the State of Pennsylvania and a citizen of the State of New York, and that there has been no trial of said suit nor any terms at which the same could be tried; and the said petitioner having
45 made and filed with said petition a bond, with good and sufficient surety, for its entering in said circuit court on the first day of its next session a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for its there appearing and entering special bail in such suit if special bail was originally requisite therein, such bond being a bond executed by said petitioner as principal and F. S. Winston and George H. Andrews as sureties, which is duly approved and filed; and upon reading the affidavit of merits on file herein, and upon reading and filing the order to show cause herein, bearing date the fourteenth day of April, 1880, and the affidavit of A. W. Evarts thereto annexed, and due proof of the service
46 upon the plaintiff's attorneys of copies of the above-mentioned petition, bond, affidavit, and order to show cause, and after hearing counsel on behalf of said petitioner: Now, upon motion of Evarts, Southmayd & Choate, attorneys for the said petitioner, it is ordered that the said petition and bond be, and the same are hereby, accepted by this court, and that this court will proceed no further in said suit.

And it is further ordered that the said cause be, and the same is hereby, and by the proceedings aforesaid, removed into the circuit court of the United States for the eastern district of New York, in the second circuit.

STATE OF NEW YORK, }
County of Kings, } *ss.:*

I, Charles B. Elliott, clerk of the county of Kings, and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that I
47 have compared the annexed with the original summons, complaint, notice of appearance, affidavit of merits, petition, bonds, affidavit, & order to show cause, & order removing cause to circuit court of the United States, filed in my office, and that the same are true transcripts thereof and of the whole of such original records.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county and court, this 26 day of April, 1880.

CHAS. B. ELLIOTT, *Clerk.*

[Kings Co. seal.]

Endorsed: Supreme court, Kings county. Julia Armstrong, as administratrix, *vs.* The Mutual Life Insurance Company of New York. Copy of record. Filed in the office of the clerk of the United States circuit court for the eastern district of New York this 5th day of May, A. D. 1880.

48 *Rule on Removal. Dated May 5, 1880.*

United States Circuit Court, Eastern District of New York.

JULIA ARMSTRONG, as Administratrix, &c.,
against
THE MUTUAL LIFE INSURANCE CO.

Evarts, Southmayd & Choate, defendant's att'ys.

This cause having been originally brought in the supreme court of the State of New York in and for the county of Kings, and having been removed into this court on the application of the defendant, and the defendant having this day duly filed herein a copy of the record in said supreme court, duly certified by the clerk thereof, and said defendant having appeared in this court by Evarts, Southmayd & Choate, its attorneys: Now, upon motion of said attorneys, it is ordered that this cause do proceed in this court as if the same had been originally brought and commenced therein, and that the appearance of said defendant by its said attorneys is hereby noted and entered.

49 United States Circuit Court for the Eastern District of New York.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, deceased,
against
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

To B. Lincoln Benedict, Esqr., clerk of the U. S. circuit court for the eastern district of New York.

SIR: Please take notice that we are retained by the defendant in the above-entitled action and enter our appearance as its attorneys therein.

New York, May 5th, 1880.

Yours, &c.,

EVARTS, SOUTHMAYD & CHOATE,
Defendant's Att'ys, 52 Wall Street, New York City.

Endorsed: Notice of appearance. Filed May 5, 1880.

50 In the Circuit Court of the United States for the Eastern District of New York.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
ads.
JULIA ARMSTRONG as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, deceased.

The Mutual Life Insurance Company of New York, the defendant

in the above-entitled action, by Evarts, Southmayd & Choate, its attorneys therein, answer the complaint as follows:

First. The said defendant admits the making by it, at or about the time in that behalf stated in the complaint, of a certain policy of insurance, of which Exhibit A to said complaint annexed purports to be a copy; but it demands the production of said original policy upon the trial hereof, and craves leave to refer to the same when produced as part of this its answer; and it denies all the
51 allegations of the complaint as to the tenor and effect of said policy, so far as the same may vary or depart from the contents of said policy when produced.

The said defendant denies that the said policy was made or delivered to the said John M. Armstrong or that the said John M. Armstrong ever had any title or interest therein, or that the consideration in said policy mentioned, or any consideration for said insurance was received by the said company from said Armstrong, or from any one on his behalf.

The said defendant has no knowledge nor information sufficient to form a belief as to the alleged death of the said John M. Armstrong, or the manner or cause thereof, and it therefore denies the allegations in that behalf in the said complaint contained.

The said defendant has no knowledge nor information sufficient to form a belief as to the issuing of letters of administra-
52 tion to the plaintiff upon the goods, chattels, and credits of the said Armstrong, or as to her qualifying or acting as such administratrix, and it therefore denies the allegations of the complaint in that behalf.

The defendant denies that the conditions of said policy have been fulfilled by the said Armstrong or by the plaintiff, and it denies that the notice and proofs of death and interest by said policy required have been furnished or delivered to it, or that the plaintiff has ever furnished any such proofs, or that any such proofs or any proof- have been presented or furnished to the defendant within one year after the death of the person insured, as by said policy required, and that any insurance whatever was effected by said policy, or that the same had any effect or validity whatever.

Second. And for a further defence the said defendant alleges, upon information and belief:

That shortly prior to the making of said policy by the de-
53 fendant, and on or about the 4th day of December, 1877, one Benjamin Hunter, being or pretending to be a creditor of the said John M. Armstrong, with intent to cheat and defraud this defendant by procuring the said policy of insurance upon the life of said Armstrong to be issued, and by then causing or procuring the death of said Armstrong by felonious means after such insurance should be effected or procured, and by collecting from this defendant and realizing upon account of such death so accomplished the amount of said policy, which intent he wholly concealed from this defendant, made application to this defendant for insurance upon the life of said Armstrong for the amount stated in said policy to be issued to him as a creditor of said Armstrong, and thereupon the said

Hunter presented to said defendant the said Armstrong as the person upon whose life said insurance was applied for and re-
54 quested by him, and the said application having been accepted and the risk approved after the usual medical examination, the said Hunter, in pursuance of his fraudulent intent aforesaid, requested of the defendant that the premiums upon said policy might be made payable quarterly, and that the said policy being made in manner and form as upon its face appears, and being simultaneously with the issue thereof assigned by the said Armstrong to him, should be issued and delivered to him by the defendant upon the payment by him of the first quarter's premium due thereon; that thereupon, at the request of said Hunter, this defendant made out the said policy, and simultaneously with the issue and delivery thereof the said Armstrong, by the procurement and at the request of said Hunter, executed and attached to said policy an assignment in writing to said Hunter of all his right, title, and interest therein, which was
55 delivered to said Hunter with said policy, and thereupon, the said Hunter paying to this defendant the first quarter's premium upon said policy, the said policy was issued and delivered by the said company to the said Hunter as the only party entitled thereto or having any interest therein; that the said Armstrong neither had nor intended to have any right, title, or interest in said policy from the time of the making and issue thereof, and that all his acts and doings in reference to the said insurance and preliminary to the making and issuing of said policy were all done on behalf and for the benefit and by the procurement of said Hunter, and not on his own behalf.

That, as the defendant is informed and believes, the said Hunter, with similar intent to cheat and defraud certain other life insurance companies by the same fraudulent and felonious means, to
56 wit, The Provident Life Insurance Company of Philadelphia and The Manhattan Life Insurance Company of New York, did, at or about the same time, apply to the said companies, respectively, for insurance upon the life of said Armstrong, and procured policies on said life to be issued in like manner to him as assignee, and did receive the same from the said companies, respectively, and pay the premiums thereon, said policies being in the one of said companies for the sum of ten thousand dollars and in the other for the sum of six thousand dollars.

And this defendant, upon information and belief, alleges the fact to be that all of the acts and doings of the said Hunter in the premises, and particularly in applying for and procuring the said policy in the complaint mentioned to be made and issued to him as assignee, were, and each of them was, done and committed in
57 pursuance and execution of a wicked and fraudulent scheme and design on his part, which he wholly concealed from this defendant, to cheat and defraud this defendant by procuring said policy, by feloniously causing or procuring said Armstrong's death, and thereby and thereupon collecting and realizing the amount of said insurance.

And this defendant, upon information and belief, alleges that after

the making and issuing of the said policies, and in further pursuance of the said fraudulent scheme and intent, the said Hunter, then being the holder and owner of all said policies, did feloniously cause and procure the said Armstrong to be murdered at Camden, in the State of New Jersey, which is the alleged death of said Armstrong in the complaint referred to. And that afterwards. and before the commencement of this action, the said Hunter was indicted for the said murder in the supreme court of the State of
58 New Jersey, and was upon such indictment convicted of the murder of said Armstrong, and sentenced to be hanged therefor, and was hanged accordingly, and that at the time of his death the said Benjamin Hunter held the said policy, and neither said plaintiff nor any other person had or claimed to have any interest therein or claim thereon.

And this defendant alleges and claims that by reason of the matters hereinbefore set forth the said policy was void in its inception and had no legal effect or validity in the hands of said Benjamin Hunter or of any other party soever, and this defendant claims and demands that it may be adjudged that the said policy was fraudulently procured to be issued and is and ever has been void and of no effect, and that the same be surrendered by the plaintiff to the defendant to be cancelled.

59 Third. And for a further and separate defense the defendant, upon information and belief, alleges:

That the plaintiff is not the owner and holder of the policy in the complaint mentioned, or entitled to any moneys which might or may be due thereon, or to maintain any action thereon.

That the said policy was issued and delivered by this defendant to the said Benjamin Hunter under the circumstances in the second defence herein set forth, to which the defendant begs leave here again to refer as a part of this separate defense in the same manner and with like effect as if the same were here again specifically repeated. That the said Benjamin Hunter and no other person held the said policy at the time of his death; that no claim can or could be made thereon, except through or under the said Benjamin Hunter, and the said Benjamin Hunter and all persons claiming
60 said policy or the moneys alleged to be due thereon, by, through, or under him, are barred and precluded from any right of recovery thereon by reason of the matters in the said second defense herein set forth.

Wherefore the defendant demands the judg. of the court that the said policy be declared and adjudged void and be surrendered for cancellation, and that the complaint be dismissed and the defendant recover its costs herein.

EVARTS, SOUTHMAYD & CHOATE,
Defendant's Attorneys.

CITY AND COUNTY OF NEW YORK, } ss:
Southern District of New York, }

Frederick S. Winston, of said city, being duly sworn, deposeth and saith: That he is the president of the Mutual Life Insurance

Company of New York, the defendant in the foregoing answer named; that he has read said answer and knows the contents
61 thereof, and that the same are true of his own knowledge, except as to those matters which are therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. And further saith not.

F. S. WINSTON, *Pr.*

Sworn to before me, this 12th day of July, 1880.

GEO. F. DEMAREST,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

Endorsed: Answer. Filed July 17, 1880.

62 At a stated term of the United States circuit court in and for the eastern district of New York, held at chambers thereof at the court-house, in the city of Brooklyn, on the 15th day of February, 1881.

Present: Hon. Charles L. Benedict, judge.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, Deceased,
against
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

On the annexed consent it is ordered that Herbert T. Ketcham, Esq., be, and he is hereby, substituted as the plaintiff's attorney in this action.

CHAS. L. BENEDICT.

Endorsed: Order of substitution. Filed February 15, 1881.

63 United States Circuit Court, Eastern District of New York.

JULIA ARMSTRONG, as Administratrix, &c., of John M. Armstrong, Deceased,
against
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

I hereby consent that Herbert T. Ketcham, Esq., attorney & counsellor at law, be substituted in my place as attorney for the plaintiff in the above-entitled action.

New York, January 17th, 1881.

GEORGE M. MACKELLAR,
Plaintiff's Attorney.

Endorsed: Consent of substitution. Filed February 15, 1881.

64 At a stated term of the circuit court of the United States in and for the eastern district of New York, held at the chambers of said court in the United States court building, in the city of Brooklyn, State of New York, in said district, on the thirteenth day of November, 1881.

Present: Hon. Hoyt H. Wheeler, district judge.

JULIA ARMSTRONG, as Administratrix of John M. Armstrong, Deceased,
against
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

On reading and filing the notice of motion, bearing date the 11th day of November, 1881, to amend the answer herein, and
65 proof of due service thereof upon the attorney for the plaintiff, and the affidavits of Frederick S. Winston, Jacob L. Halsey, Joseph H. Choate, and Prescott Hall Butler, annexed thereto, said motion having been adjourned to, and coming duly on to be heard before me on the 21st and 22d days of November, 1881, at chambers of this court, and upon the pleadings and all the proceedings heretofore had herein, and upon reading and filing the affidavit of Daniel G. Gillette, and upon reading and filing the affidavit of Herbert T. Ketcham, read in opposition to said motion, after hearing Mr. Joseph H. Choate in support of said motion, and Mr. Herbert T. Ketcham, in opposition thereto, and due deliberation having been had:

Now, upon motion of Evarts, Southmayd & Choate, attorneys for the defendant, it is ordered that leave be, and is hereby, granted to the defendant, upon the terms hereinafter stated, to file forthwith an amended answer herein, amendatory of the original answer
66 filed herein in the clerk's office of this court the 17th day of July, 1881, which said amended answer shall contain, in addition to the allegations contained in said original answer, the further allegations, namely:

Fourth. And for a further and separate defence the defendant, upon information and belief, alleges that, in and by the terms of said policy, the application therefor and each of the statements made in said application were, by every person accepting or acquiring any interest in said policy, adopted as his own, and admitted to be material and warranted to be full and true, and to be the only statements upon which said policy was made; and it was by said policy further contracted and agreed, by and between the defendant and every person having or acquiring any interest in or under said policy, as a condition of the issuance thereof, that if any statement made in said application for said policy was in any respect
67 untrue, the consideration of said policy should be deemed to have failed, and that the defendant should be without liability under it.

And the defendant, upon its information and belief, further alleges that on or about the 5th day of December, 1877, at the city of Philadelphia, the said John M. Armstrong made certain statements in writing to the defendant contained in a certain so-called application, which, in the application, referred to in said policy, and upon which the same was made, which said application bears date at Philadelphia, the 5th day of December, 1877, and was signed by said Armstrong on that day, and in and by which said application it was, among other things, declared and agreed that all the statements and answers to the printed questions written therein were

offered to the defendant as a consideration of the contract applied for, each of which statements and answers the said Arm-
68 strong adopted as his own, admitted to be material and warranted to be full, complete, and true, and to be the only statements given to the company in reply to its inquiries, and upon which, upon the granting of the insurance applied for, the defendant's contract would be founded, as by said application in possession of the defendant and ready to be produced, reference thereto being had, will more fully and at large appear.

And this defendant, upon its information and belief, further alleges that to the printed question contained in said application, "State your place of birth," the said Armstrong answered: "New York city;" and that to the printed question contained in said application "The date of birth," the said Armstrong falsely and fraudulently answered "January 5th, 1837;" whereas in truth and in fact he was born prior thereto.

That in answer to the printed question in said application,
69 "What is your age at the nearest birthday?" the said Armstrong falsely and fraudulently answered "41;" whereas in truth and in fact he would be of a greater age on said nearest birthday. That in answer to the printed question contained in said application, "Is your life now insured in any other company? If yes, give the name of each company and the amount in each," the said Armstrong falsely and fraudulently answered "Provident, $2,500; Manhattan, $2,500," thereby meaning that his life was insured in the Provident Life and Trust Company of Philadelphia to the amount of twenty-five hundred dollars, and in the Manhattan Life Insurance Company of New York to the amount of twenty-five hundred dollars; whereas in truth and in fact he was, at the time of the making of said application, insured in said companies and each of them to a much larger amount; that said defendant relied
70 upon the said representations and each of them, and believed the same to be true, in accepting the said application and making the said insurance on the terms in said policy stated, and the same were in fact material in the premises, and that but for the making of said representations by said Armstrong, and its reliance thereon as aforesaid, the defendant would not have accepted the said application, nor made the said insurance on such terms. That by reason of said false and fraudulent statements of said Armstrong, and each of the same, this defendant was and is relieved of all liability upon said policy to any person whomsoever.

And it is further ordered that if the defendant shall, by virtue of this order, file such amended answer, and shall, after a trial of this action, prevail against the plaintiff, it shall not recover such
71 costs in this action as shall have accrued prior to the filing of such amended answer.

HOYT H. WHEELER.

Endorsed: Order granting leave to file amended answer. Filed and entered November 30, 1881.

72 In the Circuit Court of the United States for the Eastern District of New York.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
ads.
JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, Deceased.

The Mutual Life Insurance Company of New York, the defendant in the above-entitled action, by Evarts, Southmayd, and Choate, its attorneys therein, makes this its amended answer to the complaint herein, pursuant to the order entered herein in the clerk's office of this court the 30th day of November, 1881, and thereupon states as follows:

First. The said defendant admits the making by it, at or about the time in that behalf stated in the complaint, of a certain policy of insurance, of which Exhibit A, to said complaint annexed, purports to be a copy; but it demands the production of said
73 original policy upon the trial hereof, and craves leave to refer to the same when produced as part of this its answer; and it denies all the allegations of the complaint as to the tenor and effect of said policy, so far as the same may vary or depart from the contents of said policy when produced. The said defendant denies that the said policy was made or delivered to the said John M. Armstrong, or that the said John M. Armstrong ever had any title or interest therein, or that the consideration in said policy mentioned, or any consideration for said insurance, was received by the said company from said Armstrong, or from any one on his behalf.

The said defendant has no knowledge nor information sufficient to form a belief as to the alleged death of the said John M. Armstrong, or the manner or cause thereof, and it therefore denies
74 the allegations in that behalf in the said complaint contained.

The said defendant has no knowledge nor information sufficient to form a belief as to the issuing of letters of administration to the plaintiff upon the goods, chattels, and credits of the said Armstrong, or as to her qualifying or acting as such administratrix, and it therefore denies the allegations of the complaint in that behalf. The defendant denies that the conditions of said policy have been fulfilled by the said Armstrong or by the plaintiff, and it denies that the notice and proofs of death and interest by said policy required have been furnished or delivered to it, or that the plaintiff has ever furnished any such proofs, or that any such proofs or any proofs have been presented or furnished to the defendant within one year after the death of the person insured, as by said policy required, and that any insurance whatever was effected by said
75 policy, or that the same had any effect or validity whatever.

Second. And for a further defence the said defendant alleges, upon information and belief, that shortly prior to the making of said policy by the defendant, and on or about the 4th day of December, 1877, one Benjamin Hunter, being, or pretending to be, a creditor of the said John M. Armstrong, with intent to cheat and defraud this defendant by procuring the said policy of insurance upon the

life of said Armstrong to be issued, and by then causing or procuring the death of said Armstrong by felonious means, after such insurance should be effected or procured, and by collecting from this defendant and realizing, upon account of such death so accomplished, the amount of said policy, which intent he wholly concealed from this defendant, made application to this defendant for insur-
76 ance upon the life of said Armstrong for the amount stated in said policy, to be issued to him as a creditor of said Armstrong; and thereupon the said Hunter presented to said defendant the said Armstrong as the person upon whose life said insurance was applied for and requested by him, and the said application having been accepted and the risk approved, after the usual medical examination, the said Hunter, in pursuance of his fraudulent intent aforesaid, requested of the defendant that the premium upon said policy might be made payable quarterly, and that the said policy, being made in manner and form as upon its face appear, and being, simultaneously with the issue thereof, assigned by the said Armstrong to him, should be issued and delivered to him by the defendant upon the payment by him of the first quarter's premium due thereon; that thereupon, at the request of
77 said Hunter, this defendant made out the said policy, and simultaneously with the issue and delivery thereof, the said Armstrong, by the procurement and at the request of said Hunter, executed and attached to said policy an assignment in writing to said Hunter of all his rights, title, and interest therein, which was delivered to said Hunter with said policy; and thereupon the said Hunter paying to this defendant the first quarter's premium upon said policy, the said policy was issued and delivered by the said company to the said Hunter as the only party entitled thereto or having any interest therein. That the said Armstrong neither had, nor intended to have, any right, title, or interest in said policy from the time of the making and issue thereof, and that all his acts and doings in reference to the said insurance and preliminary to
78 the making and issuing of said policy were all done on behalf and for the benefit and by the procurement of said Hunter, and not on his own behalf. That as the defendant is informed and believes, the said Hunter with similar intent to cheat and defraud certain other life insurance companies by the same fraudulent and felonious means, to wit, the Providence Life Insurance Company of Philadelphia and the Manhattan Life Insurance Company of New York, did, at or about the same time, apply to the said companies respectively for insurance upon the life of said Armstrong, and procured policies of said life to be issued in like manner to him as assignee, and did receive the same from the said companies respectively, and pay the premiums thereon, said policies being in one of the said companies for the sum of ten thousand dollars, and in the other for the sum of six thousand dollars.

79 And this defendant, upon information and belief, alleges the fact to be that all of the acts and doings of the said Hunter in the premises, and particularly in applying for and procuring the said policy in the complaint mentioned to be made and

issued to him as assignee, were and each of them was done and committed in pursuance and execution of a wicked and fraudulent scheme and design on his part, which he wholly concealed from this defendant, to cheat and defraud the defendant by procuring said policy, by feloniously causing or procuring said Armstrong's death, and thereby and thereupon collecting and realizing the amount of said insurance.

And this defendant, upon information and belief, alleges that after the making and issuing of the said policies, and in further pursuance of the said fraudulent scheme and intent, the said
80 Hunter, then being the holder and owner of all said policies, did feloniously cause and procure the said Amstrong to be murdered at Camden, in the State of New Jersey, which is the alleged death of said Armstrong in the complaint referred to, and that afterwards, and before the commencement of this action, the said Hunter was indicted for the said murder in the supreme court of the State of New Jersey, and was upon such indictment convicted of the murder of said Armstrong, and sentenced to be hanged therefor, and was hanged accordingly, and that at the time of his death the said Benjamin Hunter held the said policy, and neither said plaintiff nor any other person had or claimed to have any interest therein or claim thereon.

And this defendant alleges and claims that by reason of the matters hereinbefore set forth the said policy was void in its in-
81 ception and had no legal effect or validity in the hands of said Benjamin Hunter, or of any other party soever, and this defendant claims and demands that it may be adjudged that the said policy was fraudulently procured to be issued and is and ever has been void and of no effect, and that the same be surrendered by the plaintiff to the defendant to be cancelled.

Third. And for a further and separate defence the defendant, upon information and belief, alleges:

That the plaintiff is not the owner and holder of the policy in the complaint mentioned, or entitled to any moneys which might or may be due thereon, or to maintain any action thereon.

That the said policy was issued and delivered by this defendant to the said Benjamin Hunter under the circumstances in the sec-
ond defence herein set forth, to which the defendant begs
82 leave here again to refer as a part of this separate defence in the same manner and with like effect as if the same were here again specifically repeated. That the said Benjamin Hunter and no other person held the said policy at the time of his death; that no claim can or could be made thereon, except through or under the said Benjamin Hunter, and the said Benjamin Hunter and all persons claiming said policy or the moneys alleged to be due thereon by, through, or under him are barred and precluded from any right of recovery thereon by reason of the matters in the said second defence herein set forth.

Fourth. And for a further and separate defence the defendant, upon information and belief, alleges that in and by the terms of said policy the application therefor and each of the statements made

83 in said application were, by every person accepting or acquiring any interest in said policy, adopted as his own and admitted to be material and warranted to be full and true, and to be the only statements upon which said policy was made. And it was by said policy further contracted and agreed by and between the defendant and every person having or acquiring any interest in or under said policy, as a condition of the issuance thereof, that if any statement made in said application for said policy was in any respect untrue, the consideration of said policy should be deemed to have failed, and that the defendant should be without liability under it.

And the defendant, upon its information and belief, further alleges that on or about the 5th day of December, 1877, at the city of Philadelphia, the said John M. Armstrong made certain state-
84 ments in writing to the defendant contained in a certain so-called application, which is the application referred to in said policy, and upon which the same was made, which said application bears date at Philadelphia, the 5th day of December, 1877, and was signed by said Armstrong on that day, and in and by which said application it was, among other things, declared and agreed that all the statements and answers to the printed questions written therein were offered to the defendant as a consideration of the contract applied for, each of which statements and answers the said Armstrong adopted as his own, admitted to be material, and warranted to be full, complete, and true, and to be the only statements given to the company in reply to its inquiries, and upon which, upon the
85 granting of the insurance applied for, the defendant's contract would be founded, as by said application in possession of the defendant, and ready to be produced, reference thereto being had will more fully and at large appear.

And this defendant, upon its information and belief, further alleges that to the printed question contained in said application, "State your place of birth," the said Armstrong answered, "New York city;" and that to the printed question contained in said application, "The date of birth," the said Armstrong falsely and fraudulently answered, "January 5th, 1837;" whereas, in truth and in fact, he was born prior thereto.

That in answer to the printed question in said application, "What is your age at the nearest birthday?" the said Armstrong falsely and fraudulently answered, "41;" whereas, in truth and in fact, he would be of a greater age on said nearest birthday.

That in answer to the printed questions contained in said
86 application, "Is your life now insured in any other company? If so, give the name of each company and the amount in each," the said Armstrong falsely and fraudulently answered, "Provident, $2,500; Manhattan, $2,500;" thereby meaning that his life was insured in the Provident Life and Trust Company of Philadelphia to the amount of twenty-five hundred dollars, and in the Manhattan Life Insurance Company of New York to the amount of twenty-five hundred dollars, whereas in truth and

in fact, he was, at the time of the making of said application insured in said companies, and each of them, to a much larger amount; that said defendant relied upon the said representations, and each of them, and believed the same to be true in accepting the said application and making the said insurance on the terms in said
87 policy stated, and the same were in fact material in the premises, and that but for the making of said representations by said Armstrong and its reliance thereon as aforesaid the defendant would not have accepted the said application, nor made the said insurance on such terms; that by reason of said false and fraudulent statements of said Armstrong, and each of the same, this defendant was and is relieved of all liability upon said policy to any person whomsoever.

Wherefore the defendant demands the judgment of the court that the said policy be declared and adjudged void, and be surrendered for cancellation, and that the complaint be dismissed and the defendant recover its costs herein.

EVARTS, SOUTHMAYD & CHOATE,
Def't's Att'ys, 52 Wall St.

88 CITY AND COUNTY OF NEW YORK, } ss.
Southern District of New York, }

F. S. Winston, of said city, being duly sworn, deposeth and saith: That he is the president of The Mutual Life Insurance Company of New York, the defendant in the foregoing answer named; that he has read said answer and knows the contents thereof, and that the same are true of his own knowledge, except as to those matters which are therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. And further says not.

F. S. WINSTON.

Sworn to before me, this 2d day of December, 1881.

WILLIAM G. DAVIES,
Notary Public.

Endorsed: Amended answer. Filed December 2, 1881.

89 United States Circuit Court, Eastern District of New York.

JULIA ARMSTRONG, Administratrix,
vs.
THE MUTUAL LIFE INSURANCE COMPANY.

It is hereby stipulated that upon the trial of the above-entitled action the evidence of any witness living at the time of the trial, and competent to testify upon the trial of this action, may be read in evidence, by either party, from the printed record contained in the within book of the testimony of such witness given upon the trial of Benjamin Hunter for the mu-der of John M. Armstrong, in New Jersey, so far as the same may be deemed relevant and material in this action, in the same manner and with like effect as if the said persons respectively, whose testimony is so to be read, were pres-

ent at the trial of this action and gave such testimony, and subject to all legal objection and exception as to relevancy, competency, and materiality.

New York, 10th November, 1881.

H. T. KETCHAM,
Pl'ff's Attorney.

EVARTS, SOUTHMAYD & CHOATE,
Def't's Attorneys.

Endorsed: Stipulation as to testimony. Filed November 10, 1881.

90 At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the fifth day of December, in the year of our Lord one thousand eight hundred and eighty-one.

Present: The Honorable Hoyt H. Wheeler, district judge, holding the court.

JULIA ARMSTRONG, as Administratrix of John M. Armstrong,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Cause called. Hearing ordered.

Mr. Herbert T. Ketcham for plaintiff, Mr. Joseph H. Choate for defendant.

Jury empaneled.

Trial adjourned to December 6, 1881.

DECEMBER 6, 1881.

91 Trial continued.

DECEMBER 7, 1881.

Trial continued.

DECEMBER 8, 1881.

Verdict for plaintiff in the sum of $10,571.31.

Attorney for defendant moves for a stay of proceedings, with leave to move for a new trial.

Court grants 60 days' stay to hear motion and settle exceptions.

92 At a stated term of the circuit court of the United States, held in and for the eastern district of New York, at the United States court-rooms, in the city of Brooklyn, in said district, on the 13th day of May, 1882.

Present: Hon. Hoyt H. Wheeler, judge.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, Deceased,
against
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

The defendant's motion made upon the judge's minutes of the trial of this action, and upon the pleadings and all the proceedings heretofore had in said action, and upon the bill of exceptions
93 as settled that the verdict of the jury upon the trial of this

action heretofore, and on the eighth day of December, 1881, rendered herein in favor of the plaintiff and against the defendant for the sum of ten thousand five hundred and seventy-one $\frac{31}{100}$ dollars be set aside and altogether held for nothing as contrary to the evidence taken on such trial, and for a new trial of this action coming on to be heard: Now, after hearing Joseph H. Choate, Esq., of counsel for the defendant, in support of said motion, and Herbert T. Ketcham, Esq., of counsel for the plaintiff, in opposition thereto, and due deliberation being had thereon, it is ordered that said motion be, and the same is hereby, in all things denied and overruled, and that the stay of the plaintiff's proceedings heretofore granted be, and the same is hereby, vacated and set aside.

94 And upon the motion of the plaintiff to amend the verdict in said cause heard at the same time, and upon the same appearance of counsel of the respective parties, and upon the consent of the counsel for the defendant given in open court, it is further ordered that the verdict be amended and increased to the sum of 11,224 dollars and 70 cents.

HOYT H. WHEELER.

Endorsed: Order denying motion for new trial and amending verdict. Filed and entered the 17th day of May, 1882.

95 United States Circuit Court, Eastern District of New York.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, Deceased,

against

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

The issue in this action having been brought to trial on the fifth day of December, 1881, before the Hon. Hoyt H. Wheeler, judge, and a jury, and the trial thereof having proceeded on the fifth, sixth, seventh, and eighth days of December, 1881, and the jury having found for the plaintiff against the defendant in the sum of ten thousand five hundred and seventy-one dollars and thirty-one cents ($10,571.31), as the amount claimed, and interest thereon, and an order having been made and entered in this action on the

96 thirteenth day of May, 1882, amending said verdict and increasing the same to the sum of eleven thousand two hundred and twenty-four dollars and seventy cents ($11,224.70), and the plaintiff's costs having been adjusted at the sum of one hundred and sixty-two dollars and three cents (162.03):

Now, on motion of Herbert T. Ketcham, Esq., attorney for the plaintiff, it is ordered and adjudged that the plaintiff, Julia Armstrong, as administratrix of the goods, chattels, and credits of John M. Armstrong, deceased, do recover of and from the defendant, The Mutual Life Insurance Company of New York, the sum of eleven thousand two hundred and twenty-four dollars and seventy cents ($11,224.70), the amount claimed and interest thereon, together with the sum of four hundred and sixty dollars and nineteen cents ($460.19) interest on the amount of the verdict, and the sum of one hundred and

97 sixty-two dollars and three cents ($162.03) costs as adjusted; making in all the sum of eleven thousand eight hundred and forty-six dollars and ninety-two cents ($11,846.92).

Dated at Brooklyn, the fourteenth day of August, A. D. 1882.

B. LINCOLN BENEDICT, *Clerk.*

Endorsed: Judgment order. Verdict, $11,224.79; interest, 162.03; costs, 460.19; total, $11,846.92. Filed and entered this 14th day of August, 1882.

98 *Bill of Exceptions.*

In the Circuit Court of the United States for the Eastern District of New York.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, Deceased,

against

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

This action was brought in the supreme court of the State of New York in and for the county of Kings, and was duly removed therefrom before issue joined into the circuit court of the United States for the second circuit, upon petition of the defendant, on or about the fourteenth day of April, 1880, said petitioner having made and filed with said petition a bond in manner and form as required by the acts of Congress of the United States in such case made and provided. Issue was joined in said action by the filing in the clerk's office of said circuit court in and for the eastern district of New York of the answer of the defendant, on or about the seventeenth day of July, 1880, and by the filing by said defendant in said clerk's office of an amended answer, on the second day of

99 December, 1881, in compliance with and pursuant to an order theretofore and on or about the thirtieth day of November, 1881, entered in said action and filed in said clerk's office.

This action was called for trial before the Hon. Hoyt H. Wheeler, district judge, at a jury term of said court held in the United States court-house, in the city of Brooklyn and county of Kings, and eastern district of New York, in said circuit, on the fifth day of December, 1881.

Herbert T. Ketcham, S. St. J. McCatchen, and George M. MacKellar, Esqrs., appeared for the plaintiff, and Joseph H. Choate and Prescott Hall Butler, Esqrs., appeared for the defendant.

Upon the call of said case counsel for the defendant moved to further amend the answer of the defendant in said action by adding, in the twenty-fifth folio of said answer, after the allegation of the falsity of certain representations made by the insured mentioned in said answer, after the words "whereas, in truth and in fact, he was, at the time of making said application, insured in said companies and each of them to a much larger amount," the words "or that he was at such time not insured in one or both of said companies in any amount whatsoever."

Which said motion was denied.

100 To which denial counsel for the defendant duly excepted.

Counsel for the plaintiff admits that the policy in suit remained in the hands of Benjamin Hunter from the day it was delivered down to his (Hunter's) death, and that the said policy was then found in the hand- of John C. Hunter as executor of the last will and testament of Benjamin Hunter, deceased.

Counsel for the plaintiff makes no admission as to the ownership of said policy.

Counsel for the plaintiff opens the case, and offers in evidence policy number 189,427, made by the defendant upon the life of John M. Armstrong.

Counsel for defendant objects to the admission of said policy of insurance in evidence until the delivery of the same is proved. No question is made about the execution of the policy by defendant.

Objection overruled, and said policy is admitted in evidence and marked Plaintiff's Exhibit Number 1, December 5, 1881.

To which ruling, and to the admission of said policy in evidence, counsel for the defendant duly excepts.

101 Counsel for the plaintiff then calls as a witness WILLIAM MACKELLAR, who, being duly sworn and examined as a witness for the plaintiff, testifies as follows:

I reside on Staten Island. I am over 66 — of age. John M. Armstrong was my nephew. I knew him intimately. I saw him last dead at his house at Philadelphia on the day of the funeral, about the 27th of January, 1878; it was immediately after his death.

Counsel for plaintiff calls for the production of the proofs of death of John M. Armstrong, and they are produced.

Q. (Handing witness proofs of death.) Look at the papers now shown you and state if you recognize them and can identify them.

A. Yes, sir; I know these papers, they are the proofs of loss in the case of John M. Armstrong on a policy of insurance in the Mutual Life Insurance Company; I took them and delivered them to Mr. Grannis, the second vice-president of the Mutual Life Insurance Company, either on 24th or 25th of January, 1879, at their office in the city of New York.

Counsel for plaintiff offers same in evidence. They are received in evidence, and are marked Pl'tf's Ex. No. 2, Dec. 5, 1881.

102 Being cross-examined by defendant's counsel he testifies:

I was not the attorney of Mrs. Armstrong in this matter. I was her adviser as her nearest relative. Her husband was my nephew.

Q. Did you ever present any other papers than these as proofs of loss?

A. I think that was all the proofs of loss.

Q. I observe among the papers what purports to be an assignment from John M. Armstrong to Benjamin Hunter, of Philadelphia, is that an original or copy (handing witness paper)?

A. I should think it was a copy.

Q. Did you make that out?

A. I did not; the papers were forwarded to me from Philadelphia.

Q. Have you the original of which that is a copy?

A. I have nothing but what I presented.

Q. Was that the first thing that you presented to the company in reference to the loss?

A. It was.

Q. Have you never seen the original assignment of which that purports to be a copy—the assignment of this policy to Benj. Hunter?

A. I can't say positively; I have some idea that I have, but I can't say positively.

103 Q. Did you know of any other proofs of loss than these ever being presented to the company?

A. I did not.

Q. Did you afterwards present, in support of the claim, an assignment or copy of the assignment of the policy to Mrs. Julia Armstrong from John C. Hunter as executor?

A. I did.

Q. When and where was that assignment obtained from John C. Hunter?

A. In Philadelphia, a very few days, I think, previous to my showing it to Mr. Grannis.

Q. How long after the presentation of these proofs of loss which appear to have been presented in January, 1879?

A. I could not fix the exact time.

Q. Did you procure that assignment?

A. I did.

Q. And you presented that and claimed from the company the loss for Mrs. Armstrong as assignee from John C. as executor of Benjamin Hunter?

A. I did.

Q. To whom?

A. To Mr. Grannis.

Q. Didn't you state to Mr. Grannis that the policy by that assignment had become the absolute property of Mrs. Armstrong?

104 A. I don't recollect those exact words, but I think it is in substance; I think the conversation was probably not more than six weeks after I presented the proofs of loss.

Plaintiff's counsel offers in evidence letters of administration issued by Delano C. Calvin, surrogate of the county of New York, to Julia Armstrong, of the city of Philadelphia, Pa., the widow and also the administratrix of the goods, chattels, and credits of John M. Armstrong, deceased.

Defendant's counsel objects. It is not proved nor admitted that these letters were issued to the plaintiff or that the Julia Armstrong mentioned therein is identical with the plaintiff in this cause.

The court overrules the objection, and the letters of administration are admitted in evidence by the court, and marked "Pl'ff's Ex. No. 3, December 5, 1881."

To which ruling the defendant's counsel duly excepts.

Plaintiff's counsel offers in evidence an exemplified copy of the letters of administration issued to Julia Armstrong by Jesse W. Neal, registrar for the probate of wills, &c., granted at Philadelphia upon the estate of John M. Armstrong.

Defendant's counsel objects [to] the admission of the paper, on the ground, first, that the identity of Julia Armstrong is neither
105 proved nor admitted; and, secondly, that the evidence is immaterial and incompetent.

The court overrules the objection, and the paper is admitted in evidence by the court, and marked "Pl'ff's Ex. No. 4, December 5, 1881.

To which ruling the defendant's counsel duly excepts.

Plaintiff's counsel calls for the production of the written and printed application signed by John M. Armstrong and a physician for insurance in the Mutual Life Insurance Company of New York, and delivered to the firm of Vanuxem, Bates & Lambert on or about December 5, 1877.

Same is produced by the defendant's counsel, and plaintiff's counsel offers the same in evidence.

Defendant's counsel objects to its admission in evidence unless its delivery is proved.

The court overrules said objection, and the paper is admitted in evidence, and marked "Plaintiff's Ex. No. 6, December 5, 1881."

To which ruling defendant's counsel duly excepts.

At this stage of the proceedings the court is adjourned to the next day, December 6, 1881, 11 o'clock a. m.

106 ARMSTRONG *vs.* THE MUTUAL LIFE INSURANCE COMPANY.

BROOKLYN, N. Y, *December* 6, 1881.

Court met, pursuant to adjournment.

Counsel for plaintiff recalls as a witness WILLIAM MACKELLAR, who, being further examined, testifies as follows:

Q. Look at plaintiff's Exhibit No. 2, and state whether or not that paper (purporting to be a copy of an alleged assignment of the policy in suit) was a part of these proofs of death which you at that time served upon Mr. Grannis.

A. That paper, I think, was on there. The last sheet of the papers before me was not a part of the papers which I served upon Mr. Grannis (paper last referred to being cover and endorsement).

Defendant's counsel calls for the production of the assignment of the policy in suit by John M. Armstrong to Benjamin Hunter.

Same is produced by plaintiff's counsel, and is marked "for identification Assignment A, December 6, 1881."

Counsel for plaintiff then calls as a witness Mrs. AGNES M. ARMSTRONG, who, being duly sworn and examined, testifies as follows:

I reside in Philadelphia, Pennsylvania; I was the mother

107 of John M. Armstrong, deceased; he was the husband of the plaintiff; he was born on the 5th day of January, 1837, in New York, in the Bowery.

Plaintiff rests.

Defendant's counsel requests the court to direct a verdict for the defendant, on the ground that there is no evidence whatever of any delivery of this policy to Armstrong or to any one on his behalf, which delivery is directly in issue upon the pleadings.

The court refuses so to do; to which refusal the counsel for the defendant duly excepts.

Defendant's counsel further requests the court to direct a verdict for the defendant, on the ground that the plaintiff shows no title or capacity to collect or to sue; that she has no letters of administration; that the proviso or limitation contained in said so-called letters of administration (Plaintiff's Exhibit No. 3) deprives this instrument of the nature of letters of administration; and that the surrogate had no power or authority to issue such letters as those produced.

The court refuses so to do; to which refusal the counsel for the defendant duly excepts.

Counsel for defendant further requests the court to direct a
108 verdict for the defendant, on the ground that no proofs of loss and interest have been presented by any party entitled to claim under the policy in suit.

The court refuses so to do; to which refusal the counsel for the defendant duly excepts.

Counsel for the defendant further requests the court to direct a verdict for the defendant, on the ground that suit was not brought within twelve months after the cause of action accrued within the conditions of the policy in suit.

The court refuses so to do; to which refusal the counsel for the defendant duly excepts.

Counsel for defendant opens the case on behalf of the defendant and calls as a witness JACOB L. HALSEY, who, being duly sworn and examined, testifies as follows:

I reside in Orange, New Jersey. I am secretary of the Manhattan Life Insurance Company. I have held that office some 16 years in the office of the company in the city of New York. As requested, I produce from the files of that company an original application from John M. Armstrong for insurance upon his life and the notification from him of the assignment of that policy to Mr.
109 Benjamin Hunter.

The letter is marked for identification "D'f't's Ex. C, Dec. 6, 1881." The application is marked " for identification D'f't's Ex. D, Dec. 6, 1881.

Defendant's counsel calls for the policy on the life of John M. Armstrong in the same company, and it is produced by plaintiff's

counsel, and the same is offered in evidence and marked "D'f't's Ex. E, Dec. 6, 1881."

Defendant's counsel calls for the assignment of that policy by John M. Armstrong to Benjamin Hunter.

Plaintiff's counsel states that he has no such paper and never had.

Cross-examination:

The WITNESS: I know that this policy was issued upon the application purporting to be signed by John M. Armstrong. It is not the custom of our company in writing policies for delivery in a place other than New York city to date them the day upon which they are signed. The date of the policy is not always the date of delivery to the person assured. It is the rule of our company that no insurance attaches until the premium is received. The premium might be received in Philadelphia on a day after the date of the policy. It is probable that this policy was signed on December 5th in New York, and upon the evening of December 5th sent to
110 our agents in Philadelphia. I think the fact was that it was mailed and signed on the 5th, and it could not have been delivered before the 6th.

Redirect:

Q. Was there any other insurance upon the life of John M. Armstrong in your company except this?

A. No, sir; no other.

Counsel for the defendant then calls as a witness ALBERT F. WALTER, who, being duly sworn and examined, testifies as follows:

I reside at Chesnut Hill, a suburb of Philadelphia. My business is clerk in the Philadelphia office of the Manhattan Life Insurance Company; that was my business in December, 1877. I knew Benjamin Hunter.

Q. If you had an interview with him at any time in that month, state what passed between you and Mr. Benjamin Hunter, and what the date of the interview was.

Objected to by plaintiff's counsel as immaterial and irrelevant.

The COURT: What do you propose to prove?

DEFENDANT'S COUNSEL: We propose to prove—

1st. The acts of Benjamin Hunter in obtaining this policy of insurance as part of the fraudulent scheme which he subse-
111 quently carried out, in the course of which he obtained the policy in suit.

2nd. That Armstrong never knew of insurance so effected on his life by Hunter of $6,000 in the Manhattan and of $10,000 in a third company, nor had any intent to have any such insurance, and never received the policies representing such insurance, and had no control or interest in them.

The court excludes the evidence, and says: I will exclude all evidence except evidence that will defeat this contract—this very contract as between Mr. Armstrong and this company at the time when

it was made; that is, I do not think it admissible to prove fraud in one transaction to prove fraud like the one claimed in a similar transaction between other parties. I think if you were going into the whole case according to your first offer this would be admissable as showing the conspiracy and fraudulent intent of Mr. Hunter in the whole thing; but when I separate this transaction and take Mr. Hunter out of it, so far as his own rights are concerned, and leave it to stand on Mr. Armstrong's, as between him and his representatives on one side and the company on the other, then I think you must come right to the transaction between Mr. Armstrong and this company, or anybody else acting for Mr. Armstrong at the
112 time this insurance was effected. In that view I will exclude this evidence.

DEFENDANT'S COUNSEL: It is to prove the conspiracy that I offer it.

THE COURT: It is because I don't think conspiracy affects the case that I exclude it.

To which ruling and exclusion counsel for the defendant duly excepts.

Q. Where was the office of the Manhattan Life Insurance Company in Philadelphia?

A. 414 Walnut street; I saw Mr. Benjamin Hunter some time during the month of December, 1877, in that office.

Q. What was the date of this first interview with Benjamin Hunter?

A. December 3rd, 1877; the time was between 9 and 10 o'clock of the morning of that day. Mr. Hunter came in on that day to negotiate for a policy of insurance. He inquired the rates for a policy of $6,000; asked me the cost of a six thousand dollar policy of insurance on the ordinary life plan on the life of a party aged 42; that was the specific sum stated and that was the age given. I gave him the rates, the annual rates. He asked me what were the quarterly rates. I didn't name the quarterly rates, but gave him the semi-annual rates. He said he had a debtor whose life he wanted to insure. He gave the name of the debtor as John M. Armstrong; the amount, six thousand dollars. He gave me Armstrong's address as in Sansom street, above Seventh; 710, if I remember right.
113 He said he would go to Mr. Armstrong and send him down to be examined on that same day, and appointed one o'clock as the hour to be examined. He said further, in substance, that he wanted the insurance for his benefit and in such a form that it would go to him absolutely. Mr. Armstrong called at one o'clock. I remember that he was very punctual. I saw him when he called. I took him into the back office and introduced him to Mr. Carr, the general agent of our company at Philadelphia at that time. I was a clerk in Mr. Carr's office. Mr. Carr had an inner office, a private office.

Paper marked "Ex. D" for identification is the application for a policy of six thousand dollars on the life of John M. Armstrong; that application was issued to our company on the usual form used in our office,

and that was a form out of our office. The body of paper marked Ex. "C" for identification is my own handwriting; when this application Exhibit "D" was completed as it now stands, it was forwarded from our office to the home office in New York for the purpose of having a policy issued upon it. I subsequently received the policy of insurance, marked Ex. "E," from the home office, entered it in our register at the office in Philadelphia, and delivered it to Mr. Hunter on the 8th of December, 1877, at the office in Philadelphia; he called and paid the premium on the 8th of December, and then the policy was delivered to him. The premium that he paid
114 was $101.34. There was an assignment of that policy to Benjamin Hunter, and it was delivered to Mr. Hunter on the day that he paid the premium; it was delivered with the policy; this assignment was signed by John M. Armstrong.

I mailed and sent this letter, Exhibit "C," to the Manhattan Life Insurance Company at New York on the same day that the letter is dated.

Cross-examined:

I am sure that the policy of the Manhattan Life Insurance Company was delivered to no one before the 8th of December. When I say that I delivered it I mean only that I handed it myself to the person who received it, and paid the premium.

Direct:

There was no other insurance of the life of John M. Armstrong in our company than this I have related. I did not mention to Mr. Armstrong the amount of this insurance in the Manhattan Life. I had a further interview on that day, the third of December, with Mr. Benjamin Hunter. Mr. Hunter came in at 3 o'clock that same afternoon, and asked me in substance whether Mr. Armstrong had been there to be examined, and whether it had been satisfactory; and I told him I thought so. I thought the examination was satisfactory, and I took him into the back office and introduced him to Mr. Carr.

115 Counsel for the defendant then calls as a witness JAMES B. CARR, who, being duly sworn and examined, testifies as follows:

My business is general agent of the Manhattan Life Insurance Company of New York in Philadelphia, and my office is at 414 Walnut street, in that city; that was also my business in December, 1877. I knew Benjamin Hunter very slightly; I never knew John M. Armstrong before the day he came in to make his application, on the 3rd of December, 1877; at that interview I had a conversation with him with reference to writing the application, I asking the questions in the application and writing down the answers. The paper now shown me, marked for identification Ex. "D," is the original application which I wrote at that time. After the application was complete Mr. Armstrong signed it in my presence and I witnessed it. The application was made complete by my asking him the questions

and his answering and my writing them down. I asked him the questions, the same ones expressed in the application, and Mr. Armstrong answered them. I wrote the answers as dictated by Mr. Armstrong. I wrote them down as he answered them. He then signed the application in my presence. I forwarded it as it now is to the company on the same day, I think.

116 The paper is offered in evidence by the defendant's counsel, and is admitted and read in evidence as Exhibit "D."

The WITNESS: The paper now shown me, marked for identification "C," was signed by Mr. Armstrong in my office in my presence, and after it was signed by him it was mailed to New York. Mr. Armstrong requested me to send it to New York, and have the answer directed to our office, so we could hand it to Mr. Hunter. The rule of our company with relation to assignments of policies of insurance is for the party whose life is insured, in making assignments, to notify the company by letter. They take note of that and send an answer. I apprised Mr. Armstrong of this rule, and it was in consequence of my communication to Mr. Armstrong to that effect, that it was the rule of the company that there should be a notification, that he signed this letter.

The letter is offered in evidence by defendant's counsel, and is admitted and read in evidence, and is marked Ex. "C."

Counsel for defendant then calls as a witness JOSEPH ASHBROOK, who, being duly sworn and examined as a witness for the defendant, testifies as follows:

I am the manager of the insurance department of the Provident Life and Trust Company of Philadelphia. Our office at the
117 time of the transaction under consideration was 108 South Fourth street. I know Benjamin Hunter in connection with this transaction. He came to my office about the 1st of December, 1877, one or two days preceding the insurance. I then had an interview with him; he referred to Armstrong as having business relations with him. He said he had been a special partner, but he was apprehensive he might also be construed to be a general partner and that he wished an insurance to cover the actual and any possible indebtedness growing out of the relations with Armstrong. He said also that he wished to effect it in such a way that there certainly would be no trouble in getting the money in case of death. My memory does not serve me as to the amount he wanted; whether the amount was discussed particularly, I doubt as it was. The amount finally was ten thousand dollars. This interview, perhaps, extended over 10 or 20 minutes. It was quite filled with inquiries on my part and answers on his part. He asked that the premiums should be made quarterly. We assented to that and the policy was so made out. This policy was upon the life of John M. Armstrong. The transaction in our case was a contract directly between Benjamin Hunter and ourselves. Mr. Hunter stated that Mr. Armstrong would call, and he did call, in consequence of the arrangement, whatever it was, on that day, or one or two

118 days after, and I saw him and wrote this application on that interview, asking him the questions and recording the answers as he gave them. I asked him the questions that are printed and recorded his answers in writing as he stated them.

At the request of defendant's counsel witness produces paper, and referring to paper says:

Those are the answers that Mr. Armstrong made at that interview in my office on the third of December, 1877.

I desire to make a correction. I did not ask him the question, "For what amount?" That was not a proper question to ask him; that was asked Mr. Hunter, who decided upon the amount. Mr. Armstrong, when he came out of the examiner's room, was told by me that the application was for ten thousand dollars, and he replied that the amount was excessive; that there was no necessity for any such amount. I think he said twenty-five hundred would be enough. The amount was determined by Mr. Hunter. I didn't continue that conversation with Mr. Armstrong because the negotiations were with Hunter. The main office of our company was at that time in the second story of the office building, 108 South Fourth street, Philadelphia. It appears from the application that there was a medical examination of Armstrong on the same day, the 3rd day of December, 1877. The risk was approved by all those
119 whose business it is to approve, the examiner and other officers of the company.

Counsel for the plaintiff admits the signature of John M. Armstrong to the application of the Provident Life and Trust Company.

The WITNESS: After this application was signed a policy was issued upon it and paid for by Hunter. The policy was issued on the 4th. I don't remember the date of the payment. The policy runs to Benjamin Hunter. Benjamin Hunter paid the premium. The amount of the first premium was $94.20.

The application is offered in evidence by defendant's counsel, and is admitted and read in evidence, and is marked defendant's Ex. "F."

Cross-examined:

I recorded every answer that Mr. Armstrong made when I took this application. The answers in the application contained and written by me are the answers that Armstrong made on that occasion, except as to the amount which I explained. I did record all the answers, only that question was not asked him. That was not an answer which by the form of application prescribed was to be answered by him.

Q. Are you sure as to whether Armstrong said the amount of insurance was twenty-five hundred dollars or not?

A. No; I intended to convey that I was not sure as to that
120 exact amount; he said that amount, ten thousand dollars, was excessive; as to whether he indicated twenty-five hundred I am not positive.

Q. When you say the policy was issued on the 4th, do you mean any more than it bears date on the 4th?

A. That is all. Policies are sometimes issued by our company and dated on one day and delivered thereafter. It is not common in our company in consequence of an arrangement we have, but it happens not unfrequently. I have no knowledge whether that policy was issued on the 6th. I was examined upon the trial of Benjamin Hunter for the murder of John M. Armstrong.

(Counsel reads from record, mentioned in stipulation, p. —.)

Q. Did you not in that examination say: "Q. When was the premium paid on that policy? I think it was paid on the 6th."

A. You apparently read it from my testimony. If you say so, I undoubtedly did. I have no recollection of having made it, but if that is a correct copy of my testimony, what it contains is true.

Q. What you stated upon the trial of Benjamin Hunter was your memory at that time?

A. Yes, sir.

Q. And that memory was better than now?

121 A. I remembered more things then than now.

Q. What you stated in your examination in the murder trial was what you distinctly remembered then?

A. It was.

Q. Did you not say then that the policy must have been retained in your office for two days?

A. I have no recollection on that subject.

Q. Look at the record now shown you and your answer there, which is "It must have been retained in the office two days," and tell me if you do not now remember that that policy was retained for two days in that office?

A. I do not dispute that I do. I don't remember.

Q. Are you able to swear that was the fact whether it was in your desk for a day or two, and whether it was paid on the 6th?

A. I do not remember. I do not know when it was paid. I cannot say it was not paid on that day. I simply have no knowledge on the subject.

At this stage of the proceedings the court is adjourned until the next day, December 7, 1881, 11 o'clock.

ARMSTRONG *v.* MUTUAL LIFE INSURANCE CO'Y.

BROOKLYN, *December* 7, 1881.

Court met pursuant to adjournment.

122 Counsel for the defendant then calls as a witness WILLIAM H. LAMBERT, who, being duly sworn and examined, testifies as follows:

I reside in Philadelphia, Pennsylvania; I am a member of the firm of Bates & Lambert, general agents of the Mutual Life Insurance Company of New York, and in December, 1877, I was a member of the firm [of] Vanuxem, Bates & Lambert, general agents of the Mu-

tual Life Insurance Company of New York for the States of Pennsylvania and Delaware, with headquarters at Philadelphia; the office of the firm was at the northwest corner of 10th and Chestnut streets; that firm was then composed of Frederick W. Vanuxem, Edward T. Bates, William H. Lambert; Mr. Vanuxem died in January, 1880; I knew John M. Armstrong and Benjamin Hunter; I did not know them before the business for the insurance came up. On the third or fourth of December, 1877, Benjamin Hunter came to the office of the company in Philadelphia and asked concerning the rates of insurance—of endowment insurance on a person aged 40 or 41 years; the 20-year endowment was the kind of policy mentioned; he stated that he thought of insuring a person for his benefit for ten thousand dollars; he asked if this was the company in which
123 his brother, John C. Hunter was insured; I told him that it was, and he handed me a circular setting out the merits of the back-log boiler, I believe it was termed, of his own invention, and from which I noticed that it was manufactured by the firm of Isaac A. Shephard & Co. of Philadelphia; there was some other conversation relating to the general subject of insurance, and he stated that the person to be insured would probably call in a day or two, and then he left the office.

I have stated all that I can remember of that interview on the subject of this insurance. What next took place was on the 5th of December. A gentleman came to the office and told me that he came there, at the request of Mr. Hunter, to be examined for a life insurance, and to make application for life insurance; he was John M. Armstrong. I asked him to walk into an adjoining room, where I introduced him to my partner, Mr. Vanuxem, as the gentleman concerning whom Mr. Hunter had spoken on a previous occasion; no one else was in the room beside Mr. Vanuxem and myself and Armstrong; I then left the room and returned to the outer office; this room was adjoining the main office, the door being open between the two; Mr. Armstrong was somewhat deaf; at least Mr. Vanuxem was obliged to speak loudly, or did speak loudly, to him, so that I heard somewhat that was going on in the room; I heard the asking
124 of questions contained in the application, the conversation between them, the making of answers. When I came out of the room I left no one in that room except Vanuxem and Armstrong. I cannot state positively how long they two were together. I think fifteen minutes to half an hour. When I left them Mr. Vanuxem was seated on one side of a large desk, on the west side, and Mr. Armstrong facing him, upon the east side of the same table. That interview terminated by Mr. Armstrong being taken by Mr. Vanuxem into an adjoining room, the medical examiner's office. The examiner of the company, Dr. Caspar Wistar, was there; I was not present. That interview terminated by Mr. Armstrong returning to the room in which the application had been written; to Mr. Vanuxem's room. Mr. Armstrong then left the room; left the office. I immediately went into Mr. Vanuxem's room, and found Mr. Vanuxem there, seated at his table. There were papers on the table. I found this paper (Pl'ff's Exhibit No. 6, Dec. 5, 1881) there, not in its pres-

ent condition, and also this (Asssignment A, for identification, Dec. 6, 1881), and the duplicate of it. The duplicate is the same paper which is attached on the back of the application. I looked at the papers then. The application was incomplete, the amount of insurance applied for was not stated. That which is now filled
125 up with ten thousand dollars was then blank. The answer to the question as to how the premium is to be paid was also blank. It is now fflled "quarterly;" in other respects the application is the same. The yellow paper was not then attached. The other paper, the duplicate assignment, (marked G), was not then attached, but was there on the table.

I am familiar with the handwriting in which parts of the application are. It is Mr. Vanuxem's. No one was in the room from the time I left Mr. Armstrong and Mr. Vanuxem there together, until Mr. Armstrong left the room, and I on going in found all those three papers there signed "Jno. M. Armstrong."

Q. I call your attention especially to the assignment (marked for identification "A") which you say was then there, in what condition was that then?

A. The written parts were "Phila., Dec. 7," completing the printed date eighteen seven (187–); the signature "Jno. M. Armstrong" and the signature "F. W. Vanuxem."

Q. And what part of it has since been written, and what parts were then left blank, as you found them?

A. The blank for the number of the policy, for the name of the person to whom assigned, for the residence of the person to whom assigned, and the spaces for the day designating the date.

126 Q. In whose handwriting are all those various words other than the signature "John M. Armstrong"?

A. The word "Phila.," the abreviation for December, and the figure "7," and the signature "F. W. Vanuxem" are in the handwriting of Mr. Vanuxem; the number of the policy, the name "Benjamin Hunter," and the word "Philadelphia," and the date "eight" are in my handwriting. The same facts are true in regard to the duplicate of the assignment att-ched to the application, marked A, except that there has been added on this duplicate of the assignment "1304 South 10th street" in red ink, and the name "Benjamin Hunter" which refers to the residence of Benjamin Hunter in Philadelphia. I don't know who put it on. There is one omission that I made; the blank after the letter "h" is left here to enable it to be completed "her" or "his"; the addition in both papers is made by myself. The signatures of John M. Armstrong upon the assignment and duplicate are not in Mr. Vanuxem's handwriting; I have compared the signature to the application (Pl'ff's Exhibit No. 6, Dec. 5, 1881) with the signatures to the assignment (marked A for identification, Dec. 6, 1881), and to the duplicate assignment attached to the application, and in my opinion they are in the same handwriting.

127 Cross-examined:

This policy was not delivered to any one outside of our office earlier than December 12th, 1877.

Counsel for the defendant offers the two papers, being the original assignment, marked only for identification, and the duplicate assignment attached to the application in evidence.

Counsel for the plaintiff objects to the admission of the two papers offered, on the ground that they are immaterial, irrelevant, and incompetent; that their execution is not proved; that the papers bear intrinsic marks of invalidity, and of the lack of execution and delivery; that they show spoliation and alteration of their terms since the day they appear to have been signed; and that they were induced by fraud practiced upon Armstrong by Hunter if they were executed.

Objection overruled, and the papers are received in evidence as a part of the transaction according to their legal effect, and read in evidence, and marked, the original assignment, Defendant's Ex. A; the duplicate, Defendant's Ex. G.

Redirect:

Q. After Mr. Armstrong left on the fifth, leaving these three papers behind him in the possession of Mr. Vanuxem, what next occurred in relation to the business?

128 A. I found that the application was incomplete, the amount of insurance not having been entered. Armstrong had left the application with the amount blank. Hunter had told me that it was to be ten thousand dollars. I sent a messenger, I think Mr. Pomeroy, an employee of our company, to find Mr. Hunter; he was unable to find Mr. Hunter, and he came back and reported that he had not found Mr. Hunter. Mr. Hunter came to the office very shortly after, either on the afternoon of the 5th or on the morning of the 6th of December. I said to Mr. Hunter that I was very glad to see him, because I wished to learn for what amount the application was to be filled. He said, "Why, for the amount I previously mentioned, ten thousand dollars." At that interview Mr. Hunter stated that it would be more convenient for him to pay the premiums quarterly, and on account of that the word "quarterly" and the words "ten thousand dollars" were inserted in the application by Mr. Vanuxem. I reported to Vanuxem these instructions of Hunter, and the blanks were filled by him, I think, in my presence.

Q. What was the next step in the business?

A. The application being made for ten thousand dollars further examination was required, an examination of the urine.

Q. Is there a rule in respect to the examination of urine?

Objected to as immaterial and irrelevant. Excluded.

129 To which ruling counsel for defendant duly excepts.

The Witness: I sent a messenger to find Mr. Armstrong; that messenger was Mr. Sparhawk, employed in our office. An exami-

nation of the urine was made, and the report of the examination was returned to the office and was appended to the application.

By the COURT: Did Armstrong come to the office?

A. Mr. Armstrong did not come to the office, a specimen of the urine was taken to the doctor. This yellow paper is the certificate of the examination of the urine of John M. Armstrong. It is signed by Joseph G. Richardson, and also by Caspar Wistar, who is one of the examiners of the company and who examined Mr. Armstrong. It was attached to this application on the 7th of December, 1877.

I cannot say when that duplicate assignment, Ex. G, was attached to the application. I don't think it was attached in our office. The next step in the business after the certificate of the physician who made the examination was returned was the forwarding of the application to the company on the 7th of December, 1877—the policy was issued bearing date December 8th. It was received by mail from the company, being the same policy, Ex. 1,
130 already in evidence. The assignment was not sent to the company with the application; the assignment was retained by me. After the sending the application to New York prior to the receipt of the policy Mr. Hunter called a third time at the office in Philadelphia. I told him that the policy was not yet ready for delivery; that we had not yet received it from the company. He said that he had not called for that, but that he had called to pay the premium, because he intended to leave the city, to be absent for some time, and that he would pay the premium at that time and that his lawyer would call for the policy. To the best of my recollection he stated that he was going to Virginia. He paid the premium, $138.60, and with an additional fee of one dollar for the policy, $139.60, to the best of my recollection, and stated that his lawyer would call for the policy and if it was all right he would take it. This was between the 7th of December and the 12th of December. It is possible that it was on the 8th of December. I have stated all that I recollect that occurred at that interview, the third interview between myself and Hunter; there may have been some casual conversation. On, I think, the 12th of December a gentleman called, stating that he came at the request of Mr. Hun-
131 ter, that he was Mr. Hunter's lawyer, and asked if the policy was ready. I handed him the policy with the assignment attached, the blanks of which had been filled by myself as they now are. He sat down and read the policy and assignment through, apparently from beginning to end, and said that he believed it was all right and that he would take it. He left, taking the assignment, Ex. A, and the policy with him. That ended the business, so far as I can now recollect.

Q. Did Mr. John M. Armstrong ever call at the office of the company, to your knowledge, in respect to this entire business, except on the one occasion that you have stated?

A. No, sir.

Q. Did the company ever receive from Mr. Armstrong any money or premium upon that?

A. None at all.

Q. Did the company ever deliver to Mr. Armstrong any policy or paper?

A. No, sir.

Q. The duplicate assignment remained in your hands after the original assignment had been delivered with the policy to the lawyer of Hunter?

A. Yes, sir.

Q. What did you do with that?

A. It was forwarded to the company in the condition in which it now appears, except there may be some pencil memoranda upon it.

132 Cross-examined:

Q. The policy spoken of by Mr. Hunter in his first interview was not a simple life policy?

A. No; it was an endowment policy.

Q. What would be the difference between an endowment policy for twenty years and a simple life policy for ten thousand dollars as to the amount of premium?

A. The endowment policy would be considerable higher in cost.

Q. How much more?

A. If you will allow me to refer to a table of rates I can tell you exactly. At the age of forty-one the rate of ten thousand dollars insurance on a life would be $324.70 annually; for an endowment upon that in twenty years it would be $523.10. A difference of about $200. Hunter first mentioned that he wanted an endowment policy; it was not suggested by me.

Q. Did he say anything about his relations to Armstrong about the indebtedness of Armstrong to him?

A. He spoke, as near as I can tell, of a person in whom he had an interest.

Q. Did he say anything about debt?

A. I cannot say positively that he spoke about his having a debt, but he spoke of his having an insurable interest.

Q. Did he not say that he would attend to all of the business?

133 A. I don't remember that he did.

Q. Did he say that Mr. Armstrong would have nothing to do with it, except to be examined?

A. He did not mention the name of the person in the first interview. He made no remark of that character.

Q. Did he state that it was to be a policy to Mr. Armstrong to be assigned by Armstrong?

A. No; he said that the insurance was to be in his favor, for his benefit.

Q. Do you remember anything that he said as to whether he would attend to the business for Armstrong or not?

A. I don't remember anything of that kind; he did not mention Mr. Armstrong's name; he spoke of getting insurance upon a person in whom he had an interest.

Q. Did he say anything as to whether he would act for the person to be assured or not?

A. No; he spoke of it for his own benefit.

Q. Through this open door you heard some of the conversation between Mr. Vanuxem and Mr. Armstrong?

A. I heard the voices.

Q. Did you not hear Mr. Vanuxem's voice more plainly than that of Mr. Armstrong?

A. I think that I did.

Q. You were very familiar with Mr. Vanuxem's voice?

A. Very familiar with it; yes, sir.

Q. It was a plain voice, was it not?

134 A. Yes, sir.

Q. Didn't Mr. Armstrong talk in a very low tone?

A. My recollection is not very distinct of that any more than the sound of voices, and that Mr. Vanuxem's voice was elevated beyond the usual pitch.

Q. You cannot swear that you heard all the answers that Mr. Armstrong made?

A. I cannot.

Q. Did you hear all the questions asked by Vanuxem?

A. I did not.

Q. Did you hear Mr. Vanuxem ask Mr. Armstrong about the amount of insurance?

A. I cannot say that I did.

Q. Or about the quarterly premium?

A. I cannot say that I did.

Q. Did you hear any talk between them as to whether the policy was to be issued to Armstrong directly or not?

A. I cannot say that I did.

Q. By either of them?

A. I cannot.

Q. When Mr. Armstrong returned to Mr. Vanuxem's room after Dr. Wistar's examination did you hear anything more than you have now stated from Mr. Armstrong?

A. I don't remember that I did.

Q. Anything about the assignment?

A. I cannot say that I did.

Q. Or about the amount of insured to be applied for?

135 A. No, sir.

Q. Did you hear any conversation or have any conversation with Mr. Armstrong with regard to the filling in of the blank assignment?

A. I had not.

Q. Did you hear any?

A. No; I did not.

Q. Did Mr. Hunter at any time say to you that Mr. Armstrong understood the transaction?

A. I don't remember that he did.

Q. Do you remember anything at all about that subject?

A. No; I had no conversation with Mr. Armstrong at all other than the fact of his answering that he came at Mr. Hunter's request to make application for insurance?

Q. Did Mr. Hunter say anything about that; what was the conversation, if any?

A. Mr. Hunter stated that the person to be insured would probably come in a day or two.

Q. Nothing about assignment?

A. That the assignment would be in his favor, for his benefit.

Q. Did he say that the assignment was to be used as a method of getting the insurance into his favor?

A. I don't think that he did.

Q. Do you remember anything one way or the other about that?

A. Nothing more than that it would be for his benefit—

136 nothing as to the manner.

Q. You don't remember anything about what Mr. Hunter said as to the manner?

A. Nothing as to the manner in which it was to be transferred to him.

Q. The assignment was not attached to the application while it was in your office?

A. No, sir; they were forwarded.

Q. Do you remember cases of the same sort as this with regard to the assignment of the policy?

A. Yes, sir.

Q. Where a policy was to be issued to one person as the assured and by him to be assigned, did you ever know a case where the assignment was executed before the policy was delivered?

A. Yes, sir; frequently.

Q. In that case was it not always your practice to keep the assignment in your office while the application went forward to the home office?

A. The assignment would remain in the office until the policy itself was received.

Q. And then were not the assignment and policy delivered together to the assignee?

A. That is the usual custom.

Q. When Mr. Hunter told you that his lawyer would call did he mention any name?

A. My impression is that he did not mention the name; that he would send his lawyer to examine the policy.

137 Q. Did you forward the premium to the company immediately upon its receipt?

A. The premium was held by us until the policy was received from the company; the receipt which had been given for it was conditioned upon the acceptance of the application by the company.

Q. To whom was that receipt given?

A. That receipt was given to Mr. Hunter.

Q. Do you remember its general terms?

A. It in general terms stated, "Received from Benjamin Hunter one hundred and thirty-nine dollars and sixty cents" (I think was the amount), "being the amount for the quarterly premium" (I am not positive that they are the exact words), "being the amount of

the first quarterly premium and policy fee upon a policy of ten thousand dollars, twenty-year endowment plan applied for, subject to the acceptance of the application by the company."

Q. Do you remember these words in the receipt, the policy issued to Armstrong?

A. That was not in it.

Q. Do you remember Armstrong's name being there?

A. It was not in the receipt.

Q. Did Mr. Hunter say anything at all about Mr. Armstrong's consent that the policy should be delivered to him; did he say that it was all right?

138 A. No; Mr. Hunter said nothing about Mr. Armstrong's consent.

Q. What did Mr. Hunter say with regard to the delivery of the policy?

A. Mr. Hunter said that he would pay me the premium; that the policy would be called for.

Q. Did he say that Mr. Armstrong had anything to do with that?

A. He did not.

Q. Do you know who suggested an insurance directly to Armstrong to be assigned by him?

A. I presume it was Vanuxem; it was not by me; that being the custom and practice of the company.

Q. Mr. Hunter made no written application for an insurance at this time?

A. No, sir.

Q. Did he ever make any application in writing or otherwise to you for insurance to himself as the assured?

A. Not in writing; no, sir.

Q. The only application in writing was made from John M. Armstrong?

A. Yes, sir.

Q. Did you ever know a case where the policy of insurance was made by this company to any person other than the person making the written application?

A. Yes, sir. In reference to where the interest in the policy is that of relationship, the policies are in the main number of

139 instances written to the person interested in the death of the insured, such as wives' policies, children's and husband's, or father in favor of son, or *vice versa*, the insurance depending upon relationship, but not otherwise. I have not known within the last ten years of any case. Some time after Armstrong's death his brother called for blanks—proofs of death. One set, I think, was given him. A request by him for a second set was refused. I don't remember whether he said the first set was spoiled or not.

Defendant's counsel then calls as a witness RICHARD DALE SPARHAWK, who, being duly sworn and examined, testifies as follows:

I live in Philadelphia. Am in the employment of the Mutual Life Insurance Company's agency there, and was in 1877. I am the messenger referred to by the last witness, whom he sent to Mr.

John M. Armstrong for a specimen of his urine for examination. I think on the 6th day of December, 1877, in the afternoon between half-past three and half-past four o'clock, I received a letter from Mr. Lambert to take to Mr. Armstrong; I walked down to 710 Sansom street, Mr. Armstrong's place of business. I went up there and inquired for him and found him in. I delivered the
140 note to him. He read the note and said, as near as I can recollect, that his urine had been examined by the Manhattan for two thousand dollars and found normal—writing the word "normal" on a piece of paper; he said that after he had opened the letter and read it. I told him that it would be necessary to have a specimen for our doctor also, which he gave me in a bottle which I had carried from the office for that purpose. I then went back to the office and told Mr. Lambert that I had received it and then I took it up to Dr. Richardson.

I am positive that Mr. Armstrong said he had been examined for his urine on an application for the Manhattan on the morning of the 6th.

Defendant's counsel then calls as a witness EDWARD G. ASHBROOK, who, being duly sworn and examined, testifies as follows:

I reside in Philadelphia; I am the subscribing witness to Defendant's Ex. "F;" it was executed in my presence by Benjamin Hunter.

Defendant's counsel offers in evidence said paper (Defendant's Exhibit "F") as a complete document; admitted.

Cross-examined:

I know the signatures on a paper now shown me.

Plaintiff's counsel offers the same in evidence, and the same
141 is admitted and read in evidence and marked Plaintiff's Exhibit No. 7.

Q. Do you remember that the Provident policy was delivered on the 6th of December, 1877?

A. I don't remember in regard to the date of that.

Q. How as to the date of receipts of premium?

A. In regard to the receipt of premium the money was paid on the 6th of December, 1877; it was paid and marked on our cash-book on that day; it might have been in the afternoon before, but it was not after the 6th; it was written on the cash-book on the 6th of December; that is all I know about it.

Defendant's counsel then calls as a witness BENJAMIN DANIELS, who, being duly sworn and examined, testifies as follows:

I reside in Philadelphia, and am an attorney-at-law.

Q. Look at the instruments that I now show you, being the policy in this suit (marked Exhibit No. 1), and also an assignment of that policy (marked A), and tell me whether you have ever seen them before?

A. I cannot remember positively to identify those papers; I did

see a policy and an assignment, and I believe that this is the policy and this the assignment.

Q. Did you receive them from Mr. Lambert at his office in Philadelphia?

142 A. No, sir.

Q. When did you receive them?

A. I received them from Mr. Hunter after Mr. Armstrong's death. Some time in December, 1877, Mr. Benjamin called on me and asked me to go to the office of the Mutual Life Insurance Company to examine a policy and assignment, and if it was all right to receive it; that was the first direction. I afterwards called at the company's office some time in December, and was shown the policy and the assignment, I think, by Mr. Lambert; I am not positive about that, but I was shown the policy and the assignment by some of the gentlemen there, and it was in the usual form, and I so reported to Mr. Hunter; that was my connection with the matter at that time; I did not take it away; I never saw the policy until some time afterwards—until I saw it after Mr. Armstrong's death at the office of the company on the day in December I examined the policy and the assignment, and approved it and so reported to Mr. Hunter; I next saw it after Mr. Armstrong's death; a very short time after his death Mr. Benjamin Hunter brought the policy to me, and placed it in my hands for the purpose of endeavoring to collect the money from the Mutual company.

Q. Did you take any steps in that direction?

A. No, sir.

143 Q. What prevented?

Objected to by plaintiff's counsel.

The court excludes the evidence.

To which ruling the defendant's counsel duly excepts.

Counsel for defendant recalls as a witness WILLIAM H. LAMBERT, who, being further examined, testifies as follows:

I have heard the testimony of Mr. Daniels. My recollection is that Mr. Daniels received the policy. I know that it was ready, policy and assignment, at the office, and my recollection is that it was taken away by Mr. Daniels.

Q. You said before, being asked how the policy came to be made out in the name of Armstrong with an assignment, that the only explanation that you could give of it was that it was in accordance with the course of practice of your company. Will you explain what you mean by that?

A. The company's rule and practice has been never to issue a policy in favor of any person other than the insured, unless to a relative by blood or marriage of the person whose life is insured; if there is no such relationship, then the policy is made uniformly to the person who is insured, with an assignment to the beneficiary.

By PLAINTIFF'S COUNSEL: Then the rule of the company is to make a policy to the assured first and assignment afterwards.

144 The application and assignment are almost invariably made together.

Q. And the rule of the company is that the insurance is first issued to the person named in the policy as assured, is it not?

A. The policy is written in the name of the person whose life is insured, the assignment in almost all cases bearing even date with the issue of the policy. The policy is issued by the office in New York.

By DEFENDANT'S COUNSEL: Q. The practice being of a simultaneous assignment from the party whose life is insured, and who is named in the policy, to the beneficiary executed with the application, what is the practice as to the delivery of the two documents?

A. The assignment is almost invariable executed at the time of the application and before the application is forwarded to the company. And the policy with the attached assignment is in almost all cases where a previous assignment has been made delivered to the beneficiary, the assignee.

To PLAINTIFF'S COUNSEL: By beneficiary I mean the person who is named in the assignment.

By DEFENDANT'S COUNSEL: Q. Why did you put the address of Hunter on the duplicate assignment?

Objected to by plaintiff's counsel.

The court sustains the objection.

To which ruling defendant's counsel duly excepts.

145 Defendant's counsel then calls as a witness PHILIP. P. ARMSTRONG, who, being duly sworn and examined, testifies as follows:

I am brother of John M. Armstrong; I am acquainted with his handwriting; the signature on this instrument, being the assignment, Exhibit A, is in his handwriting; this other signature on this paper, Exhibit G, being the duplicate assignment annexed to the application, is in his handwriting.

The signature on the application, 2d page, is his also.

Q. Did you happen to see your brother on or about the 10th, 11th, or 12th of December, 1877?

A. I did.

Q. Did he say anything to you on the subject of his life, having been assured that day in the Mutual company?

A. He did; he said "Hunter has had my life insured to-day. I was somewhat surprised and I said "Ah, indeed, what company?" he said twenty-five hundred dollars in the Mutual and twenty-five hundred dollars in the Provident, and he believed the Manhattan had rejected him.

Cross-examined:

I could not state positively as to the date of this conversation; it was early in December.

146 Defendant's counsel then called as a witness WILLIAM CALHOUN, who, being duly sworn and examined, testifies as follows:

In 1877 I was sheriff of Camden county, New Jersey; I was present at the death of Benjamin Hunter on the 10th day of January, 1879.

Q. What was the manner of his death?

Objected to by plaintiff's counsel.

The court sustains the objection.

To which ruling counsel for defendant duly excepts.

Q. Did you as sheriff execute the process of law by hanging?

Objected to by plaintiff's counsel.

The court sustains the objection.

To which ruling counsel for defendant duly excepts.

Counsel for defendant then proceeds to read the testimony of Thomas Graham, from the printed record of the trial in the State of New Jersey, of Benjamin Hunter, for the murder of John M. Armstrong, which stipulation is as follows:

(Take in Stipulation.)

Testimony objected to by plaintiff's counsel, as incompetent, immaterial, and irrelevant.

By the COURT to defendant's counsel: What is your proposition to prove?

147 DEFENDANT'S COUNSEL: We offer to prove the second defence set up in the answer, and as the first step therein to prove that Mr. Hunter intentionally caused the death of Armstrong, Hunter at the time being the sole owner of this policy.

Same objection by plaintiff's counsel.

The court excludes the testimony upon this offer.

To which ruling and exclusion counsel for defendant duly excepts.

DEFENDANT'S COUNSEL: We offer to prove the whole defence set up in our second defence in the answer stated exactly as there alleged, that the policy was void in its inception in the hands of the only party to whom any delivery was made and for whose benefit only it was ever intended; that because of the corrupt and wicked scheme in his mind at the time he procured the insurance, then murdered Armstrong, and then claimed this money by the means of the policy.

Same objection by plaintiff's counsel.

The court excludes the testimony upon this offer and says:

I will take your offer as broad as you choose to make it; that you offer the testimony to prove that Hunter procured the application for the policy on Armstrong to be made, and that he did so for the

purpose of having the insurance effected and then disposing
148 of Armstrong and then getting the money. Take it as broad as that and I will exclude it.

To which ruling and exclusion defendant's counsel duly excepts.

DEFENDANT'S COUNSEL: We offer to prove each and all the facts stated in the second defence set forth in our answer as there alleged.

Same objection by plaintiff's counsel.

The court excludes the testimony upon this offer, excepting that as that ground of defence has set up a good many distinct facts which have been already put in proof as bearing upon other parts of the case the evidence is not excluded as to those facts, and upon the ground that the alternative in question of the policy was not assignable. No evidence as to the part taken by Armstrong is excluded.

To which ruling, and to the exclusion and the ground upon which the exclusion is put, defendant's counsel duly excepts.

DEFENDANT'S COUNSEL: We offer to prove that shortly after the execution and delivery of this policy, in or about the month of January, 1878, Benjamin Hunter being then the holder of the policy, murdered John M. Armstrong, whose life was insured thereby.

Same objection by plaintiff's counsel.

The court excludes the testimony upon this offer.

To which ruling and exclusion defendant's counsel duly excepts.

149 DEFENDANT'S COUNSEL: We offer to prove that he committed such murder with intent to thereby realize and collect from the defendant the amount of the policy in suit.

Same objection by plaintiff's counsel.

The court excludes the testimony upon this offer.

To which ruling and exclusion defendant's counsel duly excepts.

DEFENDANT'S COUNSEL: We offer to prove that before Hunter applied to the defendant for the making of insurance upon the life of John M. Armstrong, which was afterwards made by this policy, he had conceived the fraudulent and wicked scheme of procuring such insurance to be made with intent shortly afterwards to cause feloniously the death of Armstrong, for the purpose and as the means of collecting and realizing the amount of the policy from the defendant, and that he procured the policy in suit to be issued and simultaneously assigned to him, and to be delivered to him with that intent.

Same objection by plaintiff's counsel.

The court excludes the testimony upon this offer.

To which ruling and exclusion counsel for defendant duly excepts

150 DEFENDANT'S COUNSEL: We also offer to prove that at the time Hunter paid the premium upon and received this policy

from the defendant, he was resolved upon the execution of and was acting with intent to carry out the wicked scheme already stated, including the purpose of murdering Armstrong, in order to realize the amount of the policy, which he afterwards carried out.

Same objection by plaintiff's counsel.

The court excludes the testimony upon this offer.

To which ruling and exclusion counsel for defendant duly excepts.

DEFENDANT'S COUNSEL: We offer to prove that Benjamin Hunter, with a like intent to cheat and defraud the Provident Life Insurance Company of Philadelphia and the Manhattan Life Insurance Company of New York, at or about the same time, applied to those companies respectively for insurance upon the life of Armstrong, procuring the policies upon that life to be issued in the one case directly to him, and in the other case in like manner, through an assignment, as in this case, and received the same from those com-
151 panies respectively, and paid the premiums thereon, such policies being in the one company for ten thousand dollars, and in the other for six thousand dollars, as a part of the same and one entire scheme of fraud to realize the money to become payable upon all the policies in the event of the death of Armstrong, by means of his murder, to be feloniously accomplished by Benjamin Hunter.

Same objection by plaintiff's counsel.

The court excludes the testimony upon this offer.

To which ruling and exclusion counsel for defendant duly excepts.

DEFENDANT'S COUNSEL: We also offer to prove by witnesses that in the court of over and terminer in New Jersey or the court having jurisdiction, in the month of November, in the year 1878, Hunter, having been indicted for the murder of Armstrong in Camden, in that State, was brought to trial and was convicted of the murder of Armstrong, and was sentenced to be hung therefor and was hung accordingly.

Same objection by plaintiff's counsel.

The court excludes the testimony upon this offer.

To which ruling and exclusion counsel for the defendant duly excepts.

152 DEFENDANT'S COUNSEL: We offer to prove by witnesses specifically that Benjamin Hunter was, in the early part of the year 1873, guilty of the wilful murder of John M. Armstrong.

Same objection by plaintiff's counsel.

The court excludes the testimony upon this offer.

To which ruling and exclusion counsel for defendant's duly excepts.

Defendant's counsel offers in evidence the exemplified copy of the conviction of Benjamin Hunter, and the same is received without passing on its materiality and marked Defendant's Exhibit H.

DEFENDANT'S COUNSEL: The court will understand that we have made these offers for all purposes under the pleadings in this case.

THE COURT: I so understand that you offer them.

Defendant rests.

At this stage of the proceedings the court is adjourned until the next day, December 8th, 1881.

ARMSTRONG *vs.* THE MUTUAL LIFE INSURANCE COMPANY.

BROOKLYN, N. Y., *December* 8, 1881.

Plaintiff's counsel, under stipulation above mentioned, reads from the record of the trial of Benjamin Hunter portions of the
153 printed testimony of Joseph Ashbrook as follows:

"Q. Do you know Benjamin Hunter?

"A. Yes, sir.

"Q. This is the man here (pointing to the defendant)?

"A. Yes, sir.

"Q. Did you see him at any time, either in the month of November or December last, at your office?

"A. I saw him in my office about the fourth of December, but I don't know the exact date."

(It is admitted that the murder trial took place in June, 1878.)

"Q. Of what year?

"A. Last year.

"Q. Give us the whole conversation so far as you can recollect.

"A. He spoke of his business relations with Mr. Armstrong being such that he was or had been a special partner; that he had put a few thousand dollars—I think some five thousand dollars—into the concern, and that he was a little afraid, in consequence of his having been seen about Armstrong's place of business so often, and being seen driving a nail or doing something of that kind, that he had incurred a greater liability as a general partner, and not as a special partner, and he desired an insurance on the life of Mr. Armstrong. He mentioned that he wanted the insurance effected in such a way that in the event of the death of the person insured there would be no trouble as to the collection of the money. By arrangement Mr. Armstrong came in, I think, a day or two afterwards, and
154 was examined and accepted, and the policy was issued.

"Q. How soon after the call of Mr. Hunter upon you in reference to the insurance upon Armstrong's life did Armstrong appear?

"A. I think it was two or three days; I do not remember precisely.

"Q. When was the premium paid upon that policy?

"A. I think it was paid on the sixth.

"Q. What is the date of the policy?

"A. The policy is dated on the fourth.

"Q. After the application and the examination and your interview and the filling up of the policy for $10,000 in ink, how long did you retain the policy?

"A. It must have been retained two days."

Defendant's counsel reads from the same testimony of Mr. Joseph Ashbrook:

"Q. You do not remember the exact date when Mr. Hunter called upon you?

"A. No, sir.

"Q. Is there any way to fix it?

"A. No, sir.

"Q. When was the application dated?

"A. It was dated the third day of December; it may have been one or two days prior to that."

Plaintiff rests.

Counsel for defendant moves that the pleadings be amended to conform to the proof of breach of war-anty, by false representations made by Armstrong, in that the answer- in the application made by Armstrong were false wherein he stated that he was insured
155 in the Manhattan for $2,500 and in the Provident for $2,500, whereas he was, in truth, not insured at all in either or both of such companies, or, if at all, in the larger sums of $10,000 and $6,000 in such companies, respectively.

The court, upon due inquiry and investigation as to whether the plaintiff has been misled by this alleged defect in pleading, finds that she has not been misled, and holds that the variance between the answer and the proof, as alleged by the defendant, is immaterial and should be disregarded, so that there may be no question of pleading to affect the case, and so that the defence proposed to be pleaded by amendment may be submitted to the jury as if pleaded.

Counsel for the defendant requests the court to direct a verdict for the defendant, on the ground that the defense of breach of warranty has been clearly proved and established, in that the answers by Armstrong to question 7 in the application were false and untrue.

The court refuses so to do, and rules that there is evidence upon which the jury may find such answers true, and says: He is asked, "Is your life now insured in any other company?" He is bound to make true answers, and if his answers are not true they are false. Then this policy is of no effect to him or to anybody else. "Is
156 your life now insured in any other company?" He said "Yes;" and he named the other companies and the amount—"Provident $2,500, and Manhattan $2,500." He answered those questions on the 5th of December. Now, I think it should be submitted to the jury as to whether that is false, in the situation of things, on the 5th day of December. In one aspect it is certain we can say he was insured or not insured. That is mathematical. But if you construe the transaction in that way you must say the de-

fendant should have a verdict. But I don't think it should be answered in that way. They wanted to know if he was insured in any other company; that is, if he could pass the ordeal, and they wanted to know what company, if he could. Now if, prior to the 5th day of December, Mr. Armstrong had been presented to the Manhattan and Provident Companies for insurance and had passed the ordeal which they prescribe, so that he was accepted as a proper subject of insurance, and they were to insure him; if they had just got so far, and no further, what ought his answer to be? What do they want to know? They want to know if he has passed that ordeal, if he can get into these respectable companies, and so he answers what they want to know; he answers, in the Provident and in the Manhattan.

157 Then if you show that these policies had not been issued have you shown that this policy in suit was void?

I think not.

Have you shown that that answer was false?

I think not. I think he might well say he was insured in the Provident and Manhattan; that is as he understood his relation to them.

Then "what is the amount"?

$2,500 in each.

Is that true? On that day was there any amount?

There is a little evidence, some evidence—I only speak of it as a suggestion now, not of its weight—that an application for $2,500 was made on that day, the 5th day; that an insurance for the larger amount had not been got to. I cannot say on looking at this evidence that the insurance in these other companies was complete on that day. The amount was necessary. He answers $2,500 in each. If they stood at that sum as between him and the company on that day then I am unable to say that his answers were false—that they were in any respect untrue.

To which refusal and the ruling of the court thereon counsel for the defendant duly excepts.

158 Counsel for the defendant further requests the court to direct a verdict for the defendant on the ground that upon the proofs here the plaintiff cannot recover, because it is impossible for court or jury to say upon the evidence here that there was any contract between the company and Armstrong. That the only contract was with Hunter, and there is no pretense of any transfer from Hunter or his personal representatives to the plaintiff.

The court refuses so to do; to which refusal counsel for the defendant duly excepts.

Counsel for the defendant further requests the court to direct a verdict for the defendant, on the ground that, regarded as an insurance to Hunter, and Hunter only, the policy in suit is void as a wager policy, there being no evidence of any insurable interest in him.

The court refuses so to do; to which refusal counsel for the defendant duly excepts.

Counsel for the defendant further requests the court to direct a verdict for the defendant, on the ground that the defense of breach of warranty has been clearly established, in that it evidently follows that Armstrong's answer to question 8 in the application was false and untrue upon the ruling of the court as to the effect of his answer to question 7. That both answers could not, upon any
159 construction of the evidence, be true, and says we have in our answer a general denial. There is a direct allegation in the complaint that every condition was complied with. The defendant denies that the conditions of said policy have been fulfilled by said Armstrong or by the plaintiff. The condition is that he shall truthfully answer all the questions put and under the case to which I refer were are entitled to this defense. I take it because of the construction which your honor has put upon the 7th inquiry. We had an answer that Armstrong's life was now insured in those other companies. Here is the 8th question: "Have you made any proposition or opened a negotiation for insurance upon your life in any company upon which a policy has not yet been issued? A. No." Does it not inevitably follow that question 8 is answered improperly according to the construction you put upon the 7th. Taking those two questions together, does it not mean, beyond all doubt, that he had got a policy in the Manhattan and Provident for those two amounts and that there was no company in which there were open and pending negotiations.

The COURT: I think it must go to the jury, as I have suggested; this was not brought to my attention before, sharply, and I have never seen the application until now.

160 DEFENDANT'S COUNSEL: It was wholly unnecessary to refer to it until your honor put this construction upon the 7th question. What we say is what Mr. Armstrong intended is not of the least moment. The question is of the absolute verity of the statement. The court refuses to direct a verdict as requested. To which refusal counsel for the defendant duly excepts. Counsel for the defendant further requests the court to direct a verdict for the defendant upon each of the four separate upon which separately he made similar requests when the plaintiff first rested.

The court refuses each of such several requests severally.

To which several refusals, upon each of the several grounds stated, defendant's counsel duly separately excepts.

Counsel for the defendants requests the court to direct a general verdict for the defendant- upon the proofs.

The court refuses so to do.

To which refusal counsel for the defendant duly excepts.

Counsel for the defendant, now for the first time, claims the right

to close the argument to the jury under the rulings of the court as to proofs.

The court denies such motion.

Counsel for defendant duly excepts.

161 Counsel for the respective parties having summed up the case on behalf of the defendant and the plaintiff, the judge charged the jury, and therein charged:

In this trial the facts in issue are to be passed upon by the jury. I expect you to do your *jury* as jurors in passing upon such facts.

* * * * * * *

There is this contract, the operative part of it to pay to John M. Armstrong or his assigns, $10,000, by such a date, or if he dies before that time, (not to pay him, not to pay to his assigns), but to pay to his personal representatives $10,000. Now a contract is not assignable unless it runs to a man or his assigns, as a note is not negotiable unless it [is] payable to bearer or order.

* * * * * * *

The last part is not assignable. It runs direct to his personal representatives. The assignment did not carry that part.

* * * * * * *

This plaintiff, on this proof, is his legal representative. So by this contract, if he died before that day, the company promised to pay this plaintiff $10,000, unless this contract is defeated in some way.

* * * * * * *

If Mr. Armstrong lived to that day in December, 1897, Mr. Hunter would be entitled to the money and would want the paper.

162 If Mr. Armstrong died before that time, his personal representatives would want the paper, would be entitled to the money, and would want the paper.

* * * * * * *

If Armstrong lived till that time Mr. Hunter is to have the money, if he dies before that time his administrator is to have it.

* * * * * * *

Now, if the company completed and signed this paper and handed it over as completed to Mr. Hunter that is a delivery, and then it became operative, that is a delivery.

* * * * * * *

It was proper he should keep it as long as he lived. I am not speaking now about his conduct. But it was payable to him, and it was proper he should keep it as long as he lived, if Mr. Armstrong lived as long as he did. If Mr. Armstrong had died of some disease, the administratrix would have called on Mr. Hunter for the policy and would have been entitled to it.

* * * * * * *

Mr. Armstrong died or was killed, that left the paper in the hands of Mr. Hunter. He was hung. The paper went to his executor.

The promise had become perfected to Armstrong's personal representatives. She, the plaintiff, was entitled to this policy then.

163 * * * * * * *

It belonged to her when she became appointed administratrix, and it was Mr. Hunter's executor's duty to hand it over, and she has got it and has produced it here, and it is all correct in that respect; provided it was completed by the company, its agents and officers, and passed over to Mr. Hunter, as a thing to be an operative policy of insurance.

* * * * * * *

If it was, if the company understood they had got done with it, and made a policy of insurance in this form and handed it over, that is enough.

* * * * * * *

And now the plaintiff has got it, and she is well entitled, if it is a valid instrument.

* * * * * * *

After you have passed these questions of the delivery and ownership of the policy, upon which I have instructed you, there is nothing against this contract nor against the plaintiff's right to recover, except these defenses which are set up in the answer (that is after you have passed this question of delivery), and made upon the proof that this was not a valid contract, because Mr. Armstrong did not state truthfully in his application for the policy.

* * * * * * *

164 Now this paper reads that if any statement which he made in his application shall be untrue in any respect, the policy shall be void; it is no contract. They say it is untrue in some respects. They have told you what, and if it is untrue in those respects or any one, then it is void, the plaintiff cannot recover; and if not, then she can recover.

* * * * * * *

There was an interrogatory No. 7 and an interrogatory No. 8 in the application.

Now the 7th question asked him substantially, "Are you insured in any other company? If so, in what company and to what amount?" He answered, "In the Provident, $2,500; in the Manhattan, $2,500."

Now the question is, at the moment when he made that answer, was it true or was it false? If it was correct it is enough; if false, it ends the policy, and your verdict must be for the defendant.

That is said to be untrue in two aspects. It is said that he was not insured at all in that company, and that therefore it was untrue to say that he was. They say if he was insured in either company it was for amounts greater, and therefore it was untrue when he stated $2,500 in each.

Now we will take up the first branch of that. Was it true
165 that he was not insured in either one of those companies? If he had made application to be insured in those companies

upon his life, and had been examined and accepted so that it was understood between him and the company that he was insured, or that he was to be insured to date from his application, so that as between him and the company it was so understood, that he was insured in those companies, both of them, from a day before that date, why, then, you may say that he answered correctly when he said that he was, although no policy had been written out.

* * * * * * *

You see all these policies date back to a day before they are delivered; they become perfected afterwards; but when they are delivered they date back to the application or some prior date. Now if he had applied to those companies, and wanted to be insured in those companies; presented himself for insurance and they had examined him as much as they had a mind to, and had accepted him and given him to understand he was to be insured, to take effect afterwards from a date before or on that date, then he might when they asked him, "Are you insured in any other company?" say "Yes." I say you may consider that as sufficient evidence to warrant you in saying that that answer is true, and you can say it is not false, if such are the facts.

166 * * * * * * *

If they are not the facts, if his application had been rejected or he had no such ground for saying that there was an understanding between him and the company, that he was accepted as to being insured, then it is false and the policy is to go for nothing.

* * * * * * *

You will remember there is some confusion in the evidence as to when these amounts of the Manhattan and Provident policies were put into the Mutual application.

* * * * * * *

If at the very time he made those answers he had been accepted as to being insured in those companies at that time, and it was understood between him and the companies that $2,500 was to be the sum put into the application and the policies when they were made complete, so that he understood that as between him and the company that that was the way it would be, then he might answer just as it was understood to be.

If he had a right to understand so he might say so. "Manhattan $2,500. Provident $2,500."

* * * * * * *

But if the insurance was complete and understood by him,
167 between him and the company, that it was to be the larger sums in either or both, so that it was a larger sum, and he stated it smaller, then that would vitiate the policy; it would be false and untrue in that respect. That would end it.

* * * * * * *

Now, as to the 8th question in the application he answered "No." The point is, was that a true statement.

* * * * * * *

Now, if he made his application to each of those companies and they had examined him and accepted him and given him to understand that they accepted him as a subject for insurance for their company so that according to that understanding the policy was to be made out, that would date back and cover that time; that was not false.

* * * * * * *

I leave it to you to say whether these answers are substantially in any respect untrue; and if they are not shown to be untrue you will return a verdict for the plaintiff; if they are, for the defendant.

You can look at the entire evidence and say whether it is proved to you by a fair balance of proof that Armstrong's statements in the application were untrue.

The court charged the jury as to all other features of the
168 fully and in such manner that no exception was taken thereto.

Counsel for the defendant excepts to the above charge of the court in the following particulars:

First. To the charge that a contract is not assignable unless it runs to the party named or his assigns.

Second. To the charge that the second promise in the policy is not assignable.

Third. To the charge that the assignment did not carry that part of the promise or of the policy.

Fourth. To the charge that if he died before the time named his personal representatives would be entitled to the policy, notwithstanding an assignment made by him.

Fifth. To the charge that if Armstrong died before the time, the policy having been delivered to Hunter, Armstrong's administratrix would have a right to have the policy.

Sixth. To the charge that the promise to the personal representatives had then become complete.

Seventh. To the charge that it was all right if she had then got the policy from Hunter; that that was enough; that the plaintiff's title was then sufficient if the policy was valid.

169 Eighth. To the charge that there is nothing against the right to recover except the defence of untrue answers to the questions.

Ninth. To the charge wherein is left to the jury the question whether the 7th interrogatory was answered truly or not.

Tenth. To the charge wherein it is submitted to the jury to determine the same question in regard to the 8th interrogatory.

Eleventh. To the charge that if Armstrong had made application to those companies, and had been examined and accepted so that it was understood that he was insured in those companies; that the jury can find the answer true.

Twelfth. To the charge that there is some confusion in the evidence as to when these amounts were put in.

Thirteenth. To the charge that if at the very time the answer was made he had been accepted, and it was understood that $2,500 was

the sum, the jury can find the answer true, the defendant claiming in that regard that there is no evidence to support such finding.

Fourteenth. To the charge that if Armstrong had a right to understand it so he might say so.

Fifteen-h. To the construction given by the court in said charge to the 8th question, namely, that the 8th question means if
170 he had an application not decided upon pending, and not acted upon.

Sixteenth. To the charge that if they had decided and agreed it was false; and otherwise it was true.

Counsel for defendant excepts to the court's leaving it to the jury to say in respect to each of these 7th and 8th questions whether the answer is substantially true, the defendant claiming that it should be literally and exactly true.

Defendant's counsel further requests the court to charge the jury as follows:

First. That the policy and every right of recovery under it was assignable by Armstrong.

The court refuses so to charge (except as already charged), and to this refusal to charge as requested counsel for defendant duly excepts.

Second. That an assignment of it by him in the form of Dft's Ex. A, if made by him, would transfer to the assignee, Hunter, the right to recover in the event of Armstrong's death prior to the expiration of the time at which it was made payable to him.

The court refuses so to charge except as already charged, and to this refusal to charge as requested counsel for defendant duly excepts.

Third. That the clause in the policy, "or if he should die
171 before that time, then to make said payment to his legal representatives," reserved no right to his personal representatives at his decease which would not be cut off by a valid assignment of the policy made by him in his lifetime.

The court refuses so to charge (except as already charged), and to this refusal to charge as requested counsel for defendant duly excepts.

Fourth. That "legal representatives" used in that clause includes assigns.

The court refuses so to charge (except as already charged), and to this refusal to charge as requested counsel for defendant duly excepts.

Fifth. That the insertion or addition of the words, "or assigns," in that clause is not necessary to make the right to recover, in the event of his death before the day named, assignable by Armstrong in his lifetime.

The court refuses so to charge (except as already charged), and to

this refusal to charge as requested counsel for defendant duly excepts.

Sixth. That the entire policy, being one by which its terms was to pass to Armstrong's personal representatives in the event of his death, is therefore assignable by him in his lifetime.

172 The court refuses so to charge (except as already charged), and to this refusal to charge as requested counsel for defendant duly excepts.

Seventh. That if the jury find that the assignment, Ex. A, was signed by Armstrong, and left with the agents of the company with authority to fill the blanks, as they were afterwards filled, and to deliver the same to Hunter with the policy, and that they were so delivered, it made Hunter the owner of the entire policy, and of any right to recover in the event of Armstrong's death before the time named.

The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Eighth. That notwithstanding the form employed of a policy in the name of Armstrong, and an assignment simultaneously delivered from Armstrong to Hunter, if the jury find that the real contract made was between the company and Hunter, and not between the company and Armstrong, the plaintiff cannot recover.

The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Ninth. That if the jury find that the company made no contract with Armstrong, the plaintiff cannot recover.

173 The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Tenth. That if the jury find that the policy was in fact made and issued for the benefit of Hunter only, the plaintiff cannot recover.

The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Eleventh. That the plaintiff, having proved no assignment or transfer from Hunter or from his personal representative to her of the policy or any right thereunder, can derive no right to recover from, by, or under Hunter.

The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Twelfth. That if the jury find that there was no intent on the part of Armstrong to have or take any interest in the policy, the plaintiff cannot recover.

The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Thirteenth. That if the jury find that at the time of the
174 death of Armstrong Hunter was the holder and owner of the policy, the plaintiff cannot recover.

The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Fourteenth. That if the jury find that Armstrong signed the assignment and left the same with the agents of the defendant with intent that they should fill the blanks, as they did fill them, they had authority to do so.

The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Fifteenth. That if the jury find that Armstrong intended that the assignment, with the blanks filled as they were filled, should be delivered by the agents of the company with the policy to Hunter, they had authority to make such delivery.

The court refuses so to charge (except as already charged) and to this refusal to charge, as requested, counsel for defendant duly excepts.

Sixteenth. That if the jury find that the answer made by Armstrong to the 7th question in the application, in respect to other insurance, was false in any particular, the plaintiff cannot recover.

175 The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Seventeenth. If the jury find that the answer made by Armstrong in the application, in respect to other insurance, was false, in that he had no other insurance in the two other companies named, or in either of them, or that his life was already insured in those companies, respectively, or in either of them, for more than $2,500, the plaintiff cannot recover.

The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Eighteenth. That if the jury find that the answer made in answer to the 8th question by Armstrong in the application, in respect to whether or no he was in negotiation for insurance upon his life in any other companies, insurances in which had not yet been effected, was false, the plaintiff cannot recover.

The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Nineteenth. That if the jury find that, at the time of making said application, either of the two companies named by him *on* his
176 answer had been applied to for insurance upon Armstrong's life, and had approved the risk and agreed to insure him for more than $2,500, the plaintiff cannot recover.

The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Twentieth. That if the jury find that at the time of making said application to the defendant either of the two companies named by him in his answer had been applied to for insurance upon Armstrong's life by written application signed by said Armstrong, and had approved the risk, that subsequently upon such written application the said two companies, or either of them, wrote policies upon the life of said Armstrong, based upon said application respectively, which policies, or either of which, after being so written were delivered, then the insurance effected by such policies relates back in time to the time of the making of the application, and the plaintiff cannot recover.

The court refused so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Twenty-first. That the issuing of a policy or the payment of a premium are not necessary to the making of an insurance,
177 and if either of the companies in question had accepted the risk upon his life and agreed to insure him for more than $2,500, the plaintiff cannot recover.

The court refuses so to charge (except as already charged); to which refusal to charge, as requested, counsel for defendant duly excepts.

Twenty-second. That if Armstrong intended, by his answer in the application in respect to other insurance, to have the company believe that what had taken place in the two other companies, or either of them, was in respect to an insurance upon his life for only $2,500 in each, the warranty was broken and the plaintiff cannot recover.

The court refuses so to charge (except as already charged); to which refusal to charge, as requested, counsel for defendant duly excepts.

Twenty-third. That in respect to the policy in suit, when Hunter had paid the premium and the policy and the assignment had been approved by his attorney, Daniels, the insurance was complete, even although the policy was not delivered till afterwards.

The court refuses so to charge (except as already charged); to which refusal to charge, as requested, counsel for defendant duly excepts.

Twenty-fourth. That the delivery of the policy to Hunter
178 did not effect an operative in*in*strument, because no interest is shown in Hunter, and the plaintiff cannot recover.

The court refuses so to charge (except as already charged), and to this refusal to charge, as requested, counsel for defendant duly excepts.

Twenty-fifth. That if the policy was obtained by fraud, and by Hunter with fradulent intent, the policy never became an operative instrument in any hands, and the plaintiff cannot recover.

The court refuses so to charge (except as already charged); to which refusal to charge, as requested, counsel for defendant duly excepts.

Twenty-sixth. That in passing upon these questions of the truth or falsity of these statements, Armstrong's knowledge or understanding of them as immaterial. The question is as to the actual fact at the time.

The court refuses so to charge (except as already charged); to which refusal to charge, as requested, counsel for defendant duly excepts.

Twenty-seventh. That there is no evidence that the answer to question 7 was true.

The court refuses so to charge (except as already charged); to which refusal to charge, as requested, counsel for defendant duly excepts.

179 The jury retired and brought in a verdict for the plaintiff for the amount claimed, viz., eleven thousand two hundred and twenty-four dollars and seventy cents (as amended by order filed May 17, 1882).

On motion of defendant's counsel the court directs a stay of proceedings herein for sixty days, to enable defendant's counsel to prepare and file their bill of exceptions, and within which they may move for a new trial.

(Here follow the exhibits.)

Exceptions allowed and ordered to be filed.

HOYT H. WHEELER.

180 Pl'ff's Exhibit No. 1, Dec'r 5, 1881. B. L. B.

Endowment. No. 187,427. Age, 41 years. Amount, $10,000.

The Mutual Life Insurance Company of New York, in consideration of the application for this policy of insurance, which is hereby referred to and made a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any interest

Quarter annual premium, $138.60

in this contract hereby adopts as his own, admits to be material, and warrants to be full and true, and to be the only statements upon which this contract is made; and in further consideration of the payment of the sum of one hundred and thirty-eight dollars and sixty cents, at the home office of the company, at the date hereof, to be evidenced by the receipt of the company, and of the payment of the like sum, to be made at the said office on or before the eighth day of December, March, June, & September in every year during the continuance of this contract:

Does promise to pay to John M. Armstrong, of Philadelphia, Penna., his executors, administrators, or assigns, on the eighth day of December, in the year 1897, the sum of ten thousand dollars (any indebtedness to the company on account of this contract to be first deducted therefrom), at the office of the company in the city of New York, or if he should die before that time, then to make said payment to his legal representatives, within sixty days after notice and the proofs hereinafter required of the death of said John M. Armstrong shall have been furnished to the company at its said office; upon the following conditions:

1. If any statement made in the application for this policy be in any respect untrue, the consideration of this contract shall be deemed to have failed, and the company shall be without liability under it.

2. If any premium, or installment of a premium, on this policy shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the company shall be released from liability; and the only evidence of payment shall be the receipt of the company, signed by the president or secretary.

3. If the said person upon whose death this policy matures shall die in consequence of a duel, or of the violation of law, or by disease, violence, or accident brought about by intoxication; or shall impair his health by narcotics or alcoholic stimulants, or shall have delirium tremens; or if, without the written consent of the company, signed by the president or secretary thereof, he shall pass or remain beyond the limits of residence and travel, or shall personally engage in any of the occupations or employments which are specified on the back of this policy, the company shall be released from all liability on account of this contract.

4. It is hereby declared and agreed that the self-destruction of the person, whether voluntary or involuntary, and whether he be sane or insane at the time, is not a risk assumed by the company in this contract; but in every such case the company will, upon demand made and the surrender of this policy, accompanied with satisfactory proofs of such death, within sixty days after its occurrence, pay the net reserve upon it held by the company at the beginning of the year in which death occurs, calculated by the present legal standard of the State of New York, first deducting therefrom any indebtedness which shall have accrued to the company on account of this contract.

5. The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none

of its terms can be modified, nor any forfeiture under it waived, except by an agreement in writing, signed by the president or secretary of the company, whose authority for this purpose will not be delegated; and it is further declared and agreed that in case the obligation of the company under this contract be defeated by the failure of any of the considerations, or by the violation of any of the covenants or conditions recited or referred to herein, all payments which shall have been made to the company on account of this contract shall be forfeited to the company.

6. The proofs of the death by which this contract matures shall be furnished to the company within one year after such death, and shall contain full and true answers, under oath, to the questions in the company's blanks for proofs of death, relating to the life, health, and death of the person in question; and shall include (1) a statement of the extent and character of each and every claimant's interest in the policy; (2) the statement of the physician or physicians, if more than one, who attended the deceased during his last illness or within a year previous; (3) the statement of a responsible householder acquainted with the deceased; (4) the statement of the undertaker. If any of these statements be omitted the necessity of the omission must be established, and further proofs satisfactory to the company must be furnished; nor shall any suit against the company under this contract be brought, or action commenced, after one year from the time when the right of action accrues; and if any such action or suit be brought after that time, the lapse of time shall be conclusive evidence against the claim.

7. The provisions and requirements printed by the company upon the back of this policy are hereby referred to and accepted as part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the eighth day of December, A. D. one thousand eight hundred and seventy-seven.

RICHARD W. McCURDY,
Vice-President.

ISAAC F. LLOYD,
Secretary.

[Written on margin:] Express condition and agreement that the said party whose life is hereby insured shall always wear a suitable truss.

181 *Provisions and Requirements Referred to in this Policy.*

Limits of residence and travel.—The limits of travel and residence allowed under this contract include those parts of the settled limits of the United States and British Possessions which lie between the parallels of 50° and 36° 30′ north latitude; also that part of Tennessee which lies east of the Tennessee river; also those parts of Alabama, Georgia, South Carolina, and North Carolina which lie north of the parallel of 34° north latitude, and at the same time more than 100

miles from the Atlantic coast; also all places within fifty miles of Atlanta, Georgia; also the settled limits of the United States which lie west of the meridian 100° west longitude and at the same time north of the parallel 32° north latitude; also all the settled limits of the United States which lie west of the 109th meridian of west longitude, except Alaska.

Also, after November 1st and before July 1st in any calendar year, those parts of the settled limits of the United States which lie south of the parallel of 36° 30′ north latitude.

Travel is permitted in first-class vessels, by direct route, along the coast of the United States and the British North American Possessions, provided no port is entered not included at the time in the limits above allowed for travel and residence.

But travel and residence of the person at whose death this contract matures beyond the above limits, or at other seasons than are above stated, will release the company from all liability under this contract.

Occupations and employments.—The occupations and employments, engagement in which will release the company from all liability under this contract, are:

Blasting, mining, submarine labor, aeronautic travel and excursions, the manufacture, handling, or transportation of inflammable or explosive substances, service upon any railroad, steamboat, or other vessel or boat; military and naval service of every kind, whether as combatant or non-combatant, the militia, in time of peace, excepted.

Provisions for payment of premiums—payment of premiums.—All premiums are due at the office of the company, in the city of New York, at the date named in the policy, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt therefor, signed by the president or secretary. No payment made to any person except in exchange for such receipt will be recognized by the company.

Commencement of assurance year and balance of year's premium.—All premiums are payable annually in advance. When the premium is made payable in semi-annual or quarterly installments, that part of the year's premium, if any, which remains unpaid at the maturity of this contract shall be regarded as an indebtedness to the company on account of this contract, and shall be deducted from the amount of the claim; and if any such payment be not made on or before the day it is due the company shall, from that day, be released from all liability under this contract; and no credit for surplus accumulated upon this policy shall be deemed applicable to the payment of any premium, unless the previous consent of the company be obtained in writing.

Presumption of death.—No presumption of death shall arise from disappearance until this policy shall have been maintained in force by the payment of premiums throughout the expectation of life of the person upon whose death this contract matures, according to

the company's table of mortality, reckoned from the date of the policy.

Assignments.—This company will not take notice of any assignment of this policy, until a duplicate or a certified copy thereof shall be delivered to the company at its principal office; and under no circumstances will the company assume any responsibility for the validity of such assignment. If any claim be made under an assignment, proof of interest to the extent of the claim will be required.

Paid-up insurance.—After due payment of premiums for two full years the company will, if requested, and on the surrender of this policy, duly receipted, issue another policy on the life of the person whose life is insured by this policy, payable as above provided, on which no further premium shall be required, and the amount of which shall equal the sum which the net reserve will purchase, increased by the reversionary credits for over-payments, at the time of exchange, provided application for said paid-up policy be made while this policy is in force, or within sixty days after its lapse.

ISAAC F. LLOYD,
Secretary.

182 When paid; premium, $—; signatures; additions; date; amount, $—.

183 [Endorsed:] No. 187,427. The Mutual Life Insurance Co. of New York. Endowment insurance on the life of John M. Armstrong in favor of himself. Amount, $10,000, date, Dec. 8th, 1877; quarter annual payment, $138.60; policy, $1—139.60; payable on the 8th day of Dec., 1897; register, 55; endowment; receipt; edition of January, 1875.

184 Pl'ff's Exhibit 2. Dec. 5th, 1881. B. L. B.

Claimant's Certificate.

Claimant's name and residence? Julia Armstrong, No. 1508 N. Twelfth St., Philadelphia.

Number, date, & amount of policy? No. 187,427; date, December 8, 1877; $10,000.

a. In what capacity or by what title do you make the claim? As administratrix.

b. Are you legally entitled to receive the entire amount payable in the policy? I am.

Name of deceased in full? John MacKellar Armstrong.

How long had you known deceased? Twenty-four years.

Residence of deceased since above policy was issued? No. 804 N. Seventeenth St., Philadelphia.

Occupation of deceased since above policy was issued? Music typographer.

Place and date of birth of deceased? New York city; January 5, 1836.

Place and date of death? Philadelphia; January 25, 1878.

Immediate cause of death? Compound fractures of skull.

Duration of last illness? One and one-half days.

Name of every physician who attended deceased after the assault upon him in Camden, N. J.? Charles M. Thomas, Philadelphia; E. M. Howard, Camden, N. J.

185 Furnish the company with verdict of the jury of coroner's inquest? "That the deceased, John M. Armstrong, came to his death by violence, fracture of the skull, the result of blows on the head, received at the hands of some party or parties unknown, on the evening of January 23d, 1878, on Vine St., near Fifth, Camden, N. J., & died in Philadelphia on January 25th, 1878."

MRS. JULIA ARMSTRONG,
1508 N. Twelfth St., Philadelphia.

STATE OF PENNSYLVANIA, }
City of Philadelphia, } *ss:*

On this 23d day of January, A. D. 1879, personally appeared before me the above-named Julia Armstrong, and made oath that the answers by her herein made and above subscribed are true and full to the best of her knowledge and belief.

H. R. SCHULTZ, [L. S.]
Notary Public.

186 *Form of Assignment.*

For one dollar, to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged), I hereby assign, transfer, and set over all my right, title, and interest in this policy, No. 187,427, issued by The Mutual Life Insurance Company of New York, to Benjamin Hunter, of Philadelphia; and for the consideration above expressed I do also for myself, my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above-named assignee, his executors, administrators, and assigns, and their title to the said policy will forever warrant and defend.

Dated in Philadelphia this 8th day of December, 1877.

JNO. M. ARMSTRONG.

In presence of—
F. W. VANUXEM.

187 PHILADELPHIA CITY AND COUNTY, *ss:*

[L. S.] I, Jesse W. Neale, register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia, in the Commonwealth of Pennsylvania, do hereby certify and make known that on the 30 day of January, in the year of our Lord one thousand eight hundred and seventy-eight, letters of administration on the estate of John M. Armstrong, deceased, were granted unto Julia Armstrong, she having first given security well and truly to administer the same.

Given under my hand and seal of office, this 23d day of January, 1879.

H. L. KEYSER,
Dep. Register.

188 *Attending Physician's Certificate.*

How long have you practiced as a physician, and where did you receive your medical education? I have practised eight years. Received my medical education in Philander, Heidelberg, Germany, Vienna, Austria, & Edinboro', Scotland.

Name of deceased? Jno. M. Armstrong.

Place and date of death? 804 N. 17th St., Phil. Jan. 25, '78.

Were you his attending physician during his last illness? I was.

How long had you known deceased? Never knew him before last illness.

Duration of last illness? About 36 hours.

Date of your first visit in his last illness? Morning of 24th Jan., 1878.

Date of last visit? Evening of 24 Jan., 1878.

State the immediate cause of death. Brain laceration from fracture of skull.

Was a post-mortem examination made, by whom, & with what results? Yes. By Dr. Chapman, coroner's physician. Found extensive fracture of skull and pulpifying of brain.

State the apparent age of deceased. About 40 odd years.

CHAS. M. THOMAS, *M. D.*,
1319 *Arch St.*

189 STATE OF PENNSYLVANIA, }
City of Philadelphia, } *ss*:

On this 23d day of January, A. D. 1879, personally appeared before me the above-named Charles M. Thomas, M. D., a physician, in regular standing, and made affirmation that the answers by him above made and subscribed are true and full to the best of his knowledge and belief.

H. R. SCHULTZ, [L. S.]
Notary Public.

190 *Friend's Certificate.*

Name of the deceased? John M. Armstrong.

Residence? 804 No. 17th St.

Occupation? Music typographer.

Date and place of death? Jan'y 25th, 1878; Philadelphia.

Were you present at the time of death? Yes; I was.

Was the deceased insured in the Mutual Life Insurance Company of New York? Yes; he was.

Number, date, and amount of policy? No. 187,427; Decem. 8th, 1877; $10,000.

Do you know the deceased to be the person insured by the above-named policy by the name given above? I do.

Have you any interest in the above policy? I have not.

W. H. HUTT, *M. D.*,
324 *Federal St.*

STATE OF PENNSYLVANIA, } ss:
City of Philadelphia, }

191 On this 23d day of January, A. D. 1879, personally appeared before me the above-named W. H. Hutt, M. D., and made oath that the answers by him above made and subscribed are true and full, to the best of his knowledge and belief.

H. R. SCHULTZ, [L. S.]
Notary Public.

(Here follows covers, the blanks inside of which are not filled.)

Endorsed: The blanks on this side are to be filled at the company's office only. Committee on mortuary claims. May 16, 1879. Payment declined and referred to solicitor. Geo. S. Coe. Policy No. 187,427. (Penn.) Date, Dec. 8th, 1877. Age, 41. Description, E., 20 y'rs. Premium, 138.60. How payable, quarterly. Paid to March, 1878. Agency.

The intervention of brokers or commission men is unnecessary in the collection of claims by death from this company.

192 All proofs of death should be forwarded to our duly authorized agents, through whom the claim will be collected without expense, or sent direct to the company's office, where payment will be made on approved claims without charge.

Endorsed: The blanks on this side are to be filled at the company's office only. The Mutual Life Insurance Co. of New York, 140 to 146 Broadway, N. Y. Proofs of the death of John M. Armstrong. Place of death, Philadelphia, Pa., January 25th, 1878. Residence same. Insured by policy No. 187,427. In favor of ——. Assigned to Benjamin Hunter. Submitted to the company for examination and approval. Policy, 10,000. Additions, ——.

193 P. M. div., —— thousand —— hundred and —— dollars —— cents. Payable ——. Paid ——. Claims are payable only at the company's office in New York city, when due, on return of the policies properly receipted by the owner thereof.

194 PL'FF'S EXHIBIT No. 3, DEC. 5, 1881. B. L. B.

The people of the State of New York to Julia Armstrong, of the city of Philadelphia, Pennsylvania, the widow as well as the administratrix of the goods, chattels, and credits of John M. Armstrong, deceased, send Greeting:

These letters are issued with limited authority to prosecute only, and not with power to collect or compromise.

Whereas said John M. Armstrong lately departed this life intestate, not being at or immediately previous to his death an inhabitant of the county of New York, but leaving assets therein, by means whereof the ordering and granting administration of all and singular the goods, chattels, and credits whereof the said intestate died possessed, in the State of New York, and also the auditing, allowing, and final discharging the account thereof, doth appertain unto us, and we, being desirous that the goods, chattels, and the credits of the said intestate may be well and faithfully administered, applied, and disposed of, do grant unto you, the said Julia Armstrong, with the limited power expressed in the margin hereof, full power by these presents to administer and faithfully dispose of all and singular the said goods, chattels, and the credits, ask, demand, recover, and receive the debts which unto the said intestate, whilst living, and at the time of [his] death, did belong, and to pay the debts which the said intestate did owe, as far as such goods, chattels, and credits will thereunto extend and the law require, hereby requiring you to make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the said intestate within a reasonable time, and return a duplicate thereof to our surrogate of the county of New York within three months from the date of these presents; and if further personal property, or assets of any kind, not mentioned in any inventory that shall have been so made, shall come to your possession or knowledge, to make, or cause to be made, in like manner, a true and perfect inventory thereof, and return the same within three months after the discovery thereof, and also to render a just and true account of administration when thereunto required; and we do by these presents depute, constitute, and appoint you, the said Julia Armstrong, administratrix of all and singular the goods, chattels, and credits of the said John M. Armstrong, deceased.

In testimony whereof, we have caused the seal of office of the surrogate's court of the county of New York to be hereunto affixed.

Witness Delano C. Calvin, Esq., surrogate of said county, at the city of New York, the 25 day of March, in the year of our Lord one thousand eight hundred and eighty.

D. C. CALVIN, *Surrogate.*

[N. Y. Surrogate seal.]

195 [Endorsed:] Letters of administration, with limited authority, granted to Julia Armstrong, upon the goods, chattels, and credits of John M. Armstrong, deceased.

196 Pl'ff's Exhibit No. 4, Dec. 5, 1881. B. L. B.

Philadelphia City & County, *ss:*

[seal.] Jesse W. Neal, register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia, in the Commonwealth of Pennsylvania, to Julia Armstrong, Greeting:

Whereas John M. Armstrong lately died intestate, as is sworn, having whilst he lived at the time of his decease divers goods and chattels, rights, and credits within the said county by means whereof the full disposition did power of granting letters of administration whereof is manifestly known to belong to me. I, therefor-, desiring that the goods and chattels, rights and credits which were of the said deceased may be well and truly administered, converted, and disposed of according to law, do hereby grant unto you, the said Julia Armstrong, full power by the tenor of these presents to administer the goods and chattels, rights and credits which were
197 of the said deceased within the said county, as also to ask, collect, levy, recover, and receive the credits whatsoever of the deceased which at the time of his death were owing or did in any way belong to him, and to pay the debts in which the said deceased stood obliged, and so far *forth* as the said goods and chattels, rights and credits will extend according to their rate and order of law, especially of well and truly administering the goods and chattels, rights and credits which were of the said deceased, and making a true and perfect inventory and conscionable appraisement thereof, and exhibiting the same into the register's office at Philadelphia on or before the second day of March next ensuing, and also a true and just account, calculation, and reckoning of your administration upon your solemn oath to render at or before the 30th day of January, 1879, or when legally thereunto required.

And I do by these presents ordain, constitute, and depute you, the said Julia Armstrong, administratrix of all and singular the goods and chattels, rights and credits which were of the said deceased within the limits aforesaid, saving harmless and forever indemnifying me and all other officers against all persons by reason
198 rights, of your administration aforesaid, and saving all other &c.

In testimony whereof, I have caused the seal of the said office to be hereunto affixed. Dated at Philadelphia aforesaid, the 30th day of January, 1878.

H. L. KEYSER,
Pro Register.

COMMONWEALTH OF PENNSYLVANIA, }
City and County of Philadelphia, } ss:

REGISTER'S OFFICE, *December 6th*, 1881.

I, W. Marshall Taylor, register of wills and *ex-officio* clerk of the orphans' court for the city and county of Philadelphia, in the Commonwealth of Pennsylvania, do hereby certify the foregoing to be a true and accurate copy of the letters of administration on the estate of John M. Armstrong, deceased, issued unto Julia Armstrong on the 30th day of January, A. D. 1878, as the same remains on file and of record in this office.

In testimony whereof, I have hereunto set my hand and official seal at Philadelphia, the date above.

[L. S.] W. MARSHALL TAYLOR,
199 *Register of Wills & ex-officio Clerk of Orphens' Court.*

STATE OF PENNSYLVANIA, } ss:
Philadelphia County, }

I, William B. Hanna, president judge of the orphans' court of Philadelphia county, do certify that the foregoing certificate and attestation, made by W. Marshall Taylor, Esquire, register of wills and *ex-officio* clerk of said orphans' court, whose name is thereto subscribed and seal of said court affixed, and in due form and made by the proper officer.

In testimony whereof, I have hereunto set my hand this sixth day of December, in the year of our Lord one thousand eight hundred and eighty-one.

WM. B. HANNA, *P. J.*

STATE OF PENNSYLVANIA, } ss:
Philadelphia County, }

I, W. Marshall Taylor, Esquire, register of wills and *ex-officio* clerk of the orphans' court of Philadelphia county, do certify that the Honorable William B. Hanna, by whom the foregoing attestation was made and who has thereunto subscribed his name, was,
200 at the time of making thereof, and still is, president judge of the orphans' court of Philadelphia county, duly commissioned and sworn, to all whose acts as such full faith and credit are and ought to be given, as well in courts of judication as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court this sixth day of December, in the year of our Lord one thousand eight hundred and eighty-one.

[L. S.] W. MARSHALL TAYLOR,
Register of Wills and ex-officio Clerk of Orphans' Court.

203 *Attached to Exhibit* 6.—*Page* 203.

The Mutual Life Insurance Company of New York to the Medical Examiner:

SIR: If from any circumstances the history of the applicant suggests disease of the urinary organs (such as pallor, recent impairment of vision, dispepsia, dispnœa, swelling of the feet, irregular micturition, or unnatural changes in quantity or appearance of urine), and in all cases where the application is for $10,000 and over, the examiner is required to make an examination of the urine and report its condition as to the following particulars. The urine should be examined within 24 hours after its passage.

1. Name of applicant? John M. Armstrong. Was specimen passed by him? Yes.

2. Color? Yellow. Acid or alkaline? Acid. Specific gravity? 10.25.

3. Does it contain albumen? None. Or sugar? None.

4. Does the microscope show the presence of casts, blood corpuscles, or pus corpuscles? It does not.

Remarks.

Dated at Phila., State of Pa., the 6th day of December, 1877.
CASPAR WISHER.
12 | 7 | 77. JOS. G. RICHARDSON, *M. D.*

Note.—This blank must be attached to the medical examiner's certificate on the application.

204 *Attached to Exhibit* 6. *Page* 204.

For identification "G," admitted in evidence Dec. 7, 1881. B. L. B.

Form of Assignment.

For one dollar to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged), I hereby assign, transfer, and set over all my right, title, and interest in this policy, No. 187,427, issued by The Mutual Insurance Company of New York to Benjamin Hunter, of (in red ink) 1304 South 10th St., Philadelphia; and for the consideration above expressed I do also, for myself, my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above-named assignee, his executors, administrators and assigns, and their title to the said policy will forever warrant and defend.

Dated in Phila., this 8th day of Dec., 1877.
JNO. M. ARMSTRONG.

In presence of—
F. W. VANUXEM.

205 Pl'ff's Exhibit No. 7, Dec. 7, 1881. *B. L. B.*

The Provident Life and Trust Company of Philadelphia,

12993. 41. Premium, 358.70. Amount, $10,000.00.

in consideration of the representations made to them in the application for this policy, and of the sum of ninety-four $\frac{20}{100}$ dollars, to them duly paid by Benjamin Hunter, and of the quarterly premium of ninety-four $\frac{20}{100}$ dollars to be paid on or before the 4th day of every 3d, 6th, 9th, & 12th month in every year hereafter during the continuance of this policy, do covenant and bind themselves well and truly to pay or cause to be paid the sum of ten thousand dollars, $10,000, to Benjamin Hunter of Philadelphia, Philadelphia county, State of Pennsylvania, upon John M. Armstrong arriving at the age of seventy years, viz., upon the 4th day of twelfth month, nineteen hundred and six (1906). But in the event of the decease of the said John M. Armstrong before arriving at the age of of seventy years, then to pay or cause to be paid the said sum insured at their office in the city of Philadelphia, to Benjamin Hunter, his executors, administrators, or assigns, within sixty days
206 after due notice and satisfactory proof of the death, during the continuance of this policy of the said person whose life is hereby assured as above, the unpaid portion of the year's premium, if any, being first deducted therefrom: Provided always, and it is

hereby declared to be the true intent and meaning of this policy, and the same is issued and accepted by the assured upon the following express conditions and agreements:

First. If the said person, whose life is hereby assured, shall pass either by sea or land south of the parallel of 36° 30′ of north latitude between the first day of seventh month (July) and the first day of eleventh month (November), or shall be personally engaged in blasting, mining, submarine operations, or the production of highly inflammable or explosive substances, or as a mariner, engineer, fireman, brakeman, or conductor, upon any sea, inland, water, or railroad, without the consent in writing of this company previously obtained, or shall die by his or her own hand within two years after the issue of this policy (unless proof of insanity shall be furnished), or in *or in* consequence of a duel, or of the violation of the
207 laws of any nation or State, or while employed in any military or naval service whatsoever (the militia not in actual service excepted), then this policy shall be null, void, and of no effect.

Second. If the premiums as herein stipulated shall not be paid on or before the days above mentioned for the payment thereof at the office of this company, in the city of Philadelphia, or to agents elsewhere, when they produce receipts signed by the president or actuary, then in every such case this policy shall cease and determine and this company shall not be liable for the payment of the sum assured or any part thereof. If, however, the said premiums have been duly paid for the first two years of this assurance, and this policy shall be surrendered to the company within sixty days from the time when the premium becomes due, then in such case a policy shall be issued for an amount proportioned to the number of premiums paid. And no receipt shall be valid unless signed by the president or actuary.

Third. In every case where this policy shall become or be null and void, by reason of non-payment of the premiums thereon or through violation or neglect by the assured of the stipula-
208 tions contained therein, in such case all payments theretofore made hereon shall become the absolute property of the company, excepting only in the case of surrender of this policy, as above expressly provided for.

Fourth. No assignment of this policy shall be of any force or effect unless made in writing and approved by the company.

In witness whereof, the said The Provident Life and Trust Company of Philadelphia have, by their president and actuary, signed and delivered this contract, this fourth day of twelfth month, one thousand eight hundred and seventy-seven.

SAMUEL H. SHIPLEY, *President.*

Attest:

ROWLAND PARRY, *Actuary.*

Agents of the company are not authorized to sign receipts for renewal premiums, to make, alter, or discharge contracts, or waive forfeitures.

Ordinary endowment.

209 Endorsed: No. 12,993. The Provident Life & Trust Company of Philadelphia. Endowment policy. John M. Armstrong. Payable 12 mo., 4, 1906. $10,000. Date 12 mo., 4, 1877. Yearly premium, —; half-yearly premium, —; quarterly premium, $94\frac{20}{100}$. Due 3 mo. 4, 9 mo. 4, 6 mo. 4, 12 mo. 4.

210 DEF'T'S EXHIBIT A, for Identification, Dec. 6, 1881. Admitted in Evidence, Dec. 7th, 1881. B. L. B.

Form of Assignment.

For one dollar to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged), I hereby assign, transfer, and set over all my right, title, and interest in this policy No. 187,427, issued by the Mutual Life Insurance Company, of New York, to Benjamin Hunter, of Philadelphia, and, for the consideration above expressed, I do also, for myself, my executors, and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above-named assignee, his executors, administrators, and assigns, and their title to the said policy will forever warrant and defend.

Dated in Phila., this 8th day of Dec'r, 1877.

JNO. W. ARMSTRONG.

In presence of—
F. W. VANUXEM.

211 For Identification, DEFT'S EXHIBIT C. Offered in Evidence. Admitted, B. L. B., Dec. 6, 1881.

(In blue pencil), file app., rec'd Dec. 10, '77.

PHILAD'A, *Dec.* 8, '77.

MANHATTAN LIFE INS. CO., *New York.*

GENTLEMEN: Please take notice that I have this day transferred my policy No. 42617 to Mr. Benjamin Hunter, of this city.

Please acknowledge receipt of this notice, and oblige,

Yours resp'y, JNO. M. ARMSTRONG,
414 *Walnut St.*

(In lead pencil), J. L. H. Prem. is paid. J. B. Carr, W.

212 DEF'T'S EXH. "D," DEC. 6, 1881. B. L. B.

The Manhattan Life Insurance Company of New York.

AA.

1. Name of the person or persons for whose benefit assurance is applied for. (Give name in full.) Residence and P. O. address. Occupation. Relationship to insured. John M. Armstrong, 804 North 17th St. Music typographer.

2. Name of the person whose life is proposed for insurance. (Give name in full.) Residence and P. O. address. Occupation at the present time. Same person.

3. Place of birth of the person whose life is proposed to be insured. Date of his birth. New York city. January 5, 1837.

4. Age next birthday. 41.

5. Is the party whose life is proposed for assurance married or single? Married.

6. Has he resided out of the United States, or in Southern States; and, if so, when, where, and for what period, and what was the state of his health at the time; was such visit or residence in the Southern States or abroad for the benefit of his health? Has he ever had yellow fever? No.

7. State the employments he has been engaged in. What has been the effect of these employments upon his health? If he is a "merchant" or "manufacturer," say in what line of business. Is he engaged in any way in the retailing of alcoholic liquors? Music typographer. No bad effects.

8. Has he been vaccinated, or had the small-pox? Vaccinated.

9. Have his parents, brothers, or sisters been afflicted with pulmonary complaints, insanity, scrofula, or any other disease that tends to shorten life; and, if so, what? No.

10. Are his parents living? If living, give their ages and state of health; if not living, of what diseases, and at what age did they die? Father, dead; intemperance; aged 50 years. Mother, living; good health; aged 67 years.

11. If his brothers or sisters have deceased, state the cause of their death and their age. No.

12. How many brothers or sisters now living, their ages and state of health? One brother; 46; in good health.

13. Has he had, since childhood, rupture, fits, dropsy, disease of kidneys or bladder, asthma, liver complaints, palpitation, fistula, gout, apoplexy, consumption, aneurism, spitting of blood, general debility, insanity or aberration of mind; and, if so, which? No.

14. Is he subject to, or has he had dyspepsia, dysentery, or diarrhœa? No.

15. Has he been afflicted with disease of the heart? No.

16. Has he, at any time, had disease of the stomach or bowels, or of any of the vital organs; and, if so, which? No.

17. Has he had inflammatory rheumatism? If so, when, and how many times? No.

18. Has he an habitual cough, or any disease, or is any disease suspected? No.

19. What is his present state of health? Good.

20. What have been his habits as regards the use of intoxicating liquors, opium, or other stimulants? Strictly temperate.

21. Has he had, during the last seven years, any sickness or disease? If so, state the particulars, and what physician attended him, or was advised with or prescribed for him at such times. No.

22. Has he ever met with any serious personal injury; and, if so, of what nature? No.

23. Name and residence of his usual physician or medical attendant, to be referred to as to the state of his health. Dr. Lewis, Pine St.; family physician.

24. Give the name of any physician who has been consulted or advised with at any time. If more than one, give the address of each. None.

213 25. Name and residence of an intimate friend, to be referred to, competent to give information regarding the past and present state of the health of the party and his family. Wm. P. Kildare, 736 Sansom St.

26. Has any previous application been made to this company for insurance on his life? If so, what was the result of such application? No.

27. If now insured, state in what company or companies, and the amount in each? No other.

28. Has application for insurance on his life ever been declined or postponed, or has he ever been advised not to apply for insurance in any other company by any officer, examiner, agent, or solicitor for such company? If yes, what company? No.

29. Amount of assurance applied for. 6,000, six thousand dollars.

30. Term for which the assurance is desired. Life.

31. Do you wish to pay the premium in annual, semi-annual, or quarterly payments? Semi-annual.

32. Have you read the answers to the preceding questions, and are you sure they are correct? Yes.

33. Are you aware that any untrue statement or fraudulent allegation or concealment, made in effecting the proposed insurance, will render the policy void, and that in such case all payments of premiums made thereon will be forfeited? Yes.

34. Do you desire a policy to be issued on the "Tontine accumulating" plan? If so, specify whether you select the ten-year, fifteen-year, or twenty-year Tontine period. I select the —— year Tontine period. Note.—Insert number of years in writing.

35. Has the "Tontine accumulating" plan, referred to in the previous question, been fully explained to you, and do you authorize the company to retain the dividends on the policy hereby applied for, in accordance with the provisions made by the company regarding policies in the class you have selected?

36. Are you aware that in case of the discontinuance or lapse of the "Tontine accumulating" policy, which may be issued hereon, by or in consequence of the non-payment of the premium, or for any other cause, during the Tontine period above selected, no return will be made of any portion of the premiums which may have been paid on the same?

37. Does the party wish the policy to be issued with permission to travel and reside, at all seasons of the year, in any southern State, it being understood and agreed that in the making distribution of surplus upon policies of this class, regard shall be had to the experience in said class?

The applicant will state definitely, for the information of the directors, in order that they may determine understandingly on the application, any circumstance or fact in relation to the present or past

state of health of the said ——, and which circumstance or fact is not included in the foregoing statement.

Signature of person whose life is to be insured:

JOHN M. ARMSTRONG.

I, John M. Armstrong, one of the persons named in this application and declaration, being desirous of effecting an assurance with the Manhattan Life Insurance Company upon the life of myself, of Philadelphia, county of Philadelphia, State of Pennsylvania, the individual described in this application, during the term applied for, do hereby declare and warrant that his age next birthday will be 41 years; that he is now in good health, and does usually enjoy good health; that he is not addicted to habits of intemperance, or other vices tending to shorten life; and that the preceding answers and annexed statements are correct and true, in which is not concealed, withheld, or unmentioned any circumstance in relation to the past or present state of his health, habits of life, or condition which may render an insurance on his life more than usually hazardous, or with which the directors of said company ought to be made acquainted; and that I have an interest in his life to the full amount of the sum of six thousand dollars. And I hereby agree that the assurance hereby proposed shall not be binding on said company until the amount of premium, as stated therein, shall be received by said company, or an accredited agent thereof, in the lifetime of the said ——. And I hereby expressly waive all right to bring any action for any claim whatsoever arising under any policy issued to me on this application and declaration, except in the courts of the State of New York, or in the United States courts. And I hereby further agree that the preceding answers given to the annexed questions, and the accompanying statements and this declaration shall be the basis and form part of the contract or policy between me and the said company; and if the same be not in all respects true and correctly stated, the said policy shall be void, and all moneys which may have been paid on account thereof shall be forfeited to said company.

Dated at Philadelphia, this third day of December, 1877.

Signature of person for whose benefit the insurance is made:

(Wife's name.) —— ——.

(Husband's name.) JOHN M. ARMSTRONG.

Witness: JAMES B. CARR.

214 For Identification, Ex. D., Offered in Evidence and Admitted Dec. 6, 1881.

B.

The Manhattan Life Insurance Company to Wm. P. Kildare.

Mr. John M. Armstrong having applied to this company for insurance on the life of himself refers the company to you for information respecting his general health and habits of life, also in regard to family. Please, therefore, answer the following questions:

1. How long have you known him? 20 years.

2. Has your acquaintance been such as to enable you to know particularly his habits and health? No.

3. Have you ever heard that, or do you know of, any member of the family being subject to insanity, dropsy, lung complaints, scrofula, or other serious diseases? No.

4. Has he heretofore indulged in any practices or habits injurious to his health? Not to my knowledge.

5. Does he now indulge in any such practices or habits? Not to my knowledge.

6. Have you any reason to believe that he has an impaired or a feeble constitution? No.

7. Have you ever known him to be sick? What diseases? No.

8. Does he use any intoxicating liquors? Temperate.

9. How much?

10. Is he healthy and free from any circumstances tending to shorten life? As far as I know he is.

11. Is he strong and vigorous, or is he what you would consider a weakly person? He is quite an active man.

Dated at Philadelphia, this 3 day of Dec., 1877.

(Signed) W. P. KIDARE.

C.

Questions to be answered by the family physician or medical attendant of the party whose life is proposed for insurance.

DOCTOR ——: Please reply to the interrogatories below by filling up the blanks as fully and explicitly as possible, and return the same to bearer. Charges, if any, place to account of —

Yours, respectfully, —— ———.

1. How long have you known Mr. ———? Have you been in the habit of seeing him frequently, and giving him medical attendance, and for what diseases?

2. Have his parents, brothers, or sisters, been afflicted with pulmonary complaints, scrofula, insanity, or any other disease that tends to shorten life; and, if so, what?

3. Has he any organic disease in any part of the body, or is any suspected; and, if so, what is it?

4. Has he at any time been afflicted with insanity, gout, dropsy, palsy, apoplexy, disease of the heart, aneurism, rupture, fistula, spitting of blood, affections of the lungs or other viscera, or with any organic disease; and, if so, describe the character of the disease?

5. Has he an hereditary predisposition to any disease; and, if so, what is it?

6. What is the ordinary or average rate and other qualities of his pulse?

7. Are his lungs sound and healthy?

8. Is his heart perfectly healthy?

9. Is he now in good health?

10. Has he ever used intoxicating liquors to excess?

11. Does he now use any intoxicating liquor or opium, or any narcotic or stimulant?

12. Does he lead an active or a sedentary life?
13. Does he possess a healthy constitution?

Dated at ———, this ——— day of ———, 187—.

(Signed) ——— ———.

215 *Notice.*

Powers and Duties of Agents, &c.

Agents are authorized to receive applications for insurance and forward them to the office of this company, at New York, to be there acted on. They are authorized to receive premiums on policies and renewals, but only when furnished with such policies and renewal receipts, duly signed by the president or secretary of this company, except that premiums may be paid conditionally at the time of making the application, and after examination by the company's local medical examiner at the agency, subject to the company's action on the case at their home office, in which case the agent will give the following conditional receipt:

AGENCY OF THE
MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,
———, 187—.

Received from ——, —— dollars, deposited by ——, for the purpose of procuring an insurance in the Manhattan Life Insurance Company of New York on the life of ——, of ——, according to the terms of an application made by said ——, dated ——, 187—.

The condition of this receipt being, that should the said application be accepted by the said company, and a policy be issued by them on the same, it shall be binding and take effect from the date of this receipt; but, should the said application not be accepted by the said company, the amount paid hereon shall be returned by me to said ——, on presentation and surrender of this receipt to me.

Agents are not authorized to issue this receipt at any time, except at the time of the examination by the company's medical examiner. The amount receipted for must be the regular premium installment, according to the mode of payment selected, as stated in the application. Agents are not authorized to receive partial payments or payments on account. Nor are they authorized to receive notes or anything except money. ——— ———.

The premium on policies is payable at the commencement of the risk, in one annual installment, or, if the assured desire, in semi-annual or quarterly payments. Should any change be desired thereafter, application must be made to the company in writing, for permission, which the company will grent at its discretion. The premiums are always due on the several days stipulated in the policy, and all risk to the company commences at the time of the actual payment of the first premium, without regard to the date of the policy (unless otherwise stipulated in the policy), and continues until the day named in the policy for the payment of the next premium, at 12 o'clock noon, and no longer.

No premium will be received by the company, continuing any

risk, after the day named in the policy, for the payment of such premium, unless the insured is then in perfect health, and the risk will be continued at the option of the company; no payment of premium is binding on the company, unless the same is acknowledged by the renewal receipt of the company, signed by the president or secretary. Agents are not authorized to bind the company by the issue of policies or permits, nor give receipts for the renewal of premiums, except as above provided; neither are they authorized to waive forfeitures, or make, alter, or discharge contracts.

All receipts of the company at any time, for premiums past due, are viewed by the parties in interest as acts of courtesy of the company, and in no case to be considered a precedent, nor as a waiver of the forfeiture of the policy, according to the conditions expressed therein.

[Endorsed:] Policy No. 42617. Passed. The Manhattan Life Insurance Co. of New York. Office, 156 & 158 Broadway. Dated 5 day of Dec., 1877. Examination No. ——. Life of John M. Armstrong. Agency No. ——.

216 DEF'T'S EXH. E. B. L. B. DEC. 6, '81.

Sum insured, $6,000. No. 42617. Premium, $101 $\frac{34}{100}$.

The Manhattan Life Insurance Company of New York.

This policy of insurance witnesseth that the Manhattan Life Insurance Company, in consideration of the representations made to them in the application for this policy, and in the statements respecting the person or family of the person whose life is hereby insured, which application and statements are hereby referred to and made a part of this contract, and are to be mutually regarded as warrantees, and upon the faith of which application, statements, and representations this policy is issued, and of the sum of one hundred and one $\frac{34}{100}$ dollars to them in hand paid, and of the further sum of one hundred and one $\frac{34}{100}$ dollars to be paid at their office, in the city of New York, on or before the 5th day of June and December, at noon, in every year during the continuance of this policy, do assure the life of John M. Armstrong, of Philadelphia, in the county of Philadelphia, State of Pennsylvania, in the amount of six thousand dollars, for the term of his natural life.

And the said company does hereby agree to pay, at their office in the city of New York, the said sum insured to the executors, administrators, or assigns of the said assured within ninety days after due notice and the filing of satisfactory evidence of the death of the said John M. Armstrong, during the continuance of this policy, and after proof of the just claim of the assured under the same, deducting therefrom any indebtedness to said company on account of or incident to this policy.

This policy is issued and accepted upon the following express conditions:

1st. That this policy shall not take effect until the first premium

hereinbefore specified shall have been paid in cash during the lifetime of the person whose life is hereby insured, and that if any subsequent premium on this policy shall not be paid in cash on or before the day when due then this policy shall cease and determine.

2d. That no premium hereon shall be deemed paid unless it be paid in cash, and a renewal receipt, duly signed by the president or secretary of this company, shall have been given therefor at the time of such payment.

3d. That receipt of premiums past due are acts of courtesy of the company, and in no case are to be considered a precedent nor as a waiver of the forfeiture of the policy at a subsequent time according to the conditions expressed therein.

4th. That in case the said person whose life is hereby insured shall be engaged in blasting, mining, subterranean or submarine occupations, or in the manufacture or transportation of gunpowder, nitro-glycerine, or other highly explosive material, or in case the said person shall be employed upon a railroad train, or steamboat, or sailing vessel, or as engineer or fireman of a steam-engine, or shall enter into any military or naval service (the militia not in actual service excepted), or shall make a balloon ascension, or shall enter upon an aerial voyage, this policy shall be null and void, unless the express permission of the said company in writing, signed by the president or secretary, be previously given.

5th. That he shall not pass beyond the limits of the United States, the Dominion of Canada, Nova Scotia, and New Brunswick, lying south of the forty-ninth degree of north latitude, nor visit those parts of the United States which lie south of the southern line of the States of Virginia, Kentucky, Missouri, and Kansas, between the first day of July and the first day of November, without the consent of this company previously obtained in writing, signed by their president or secretary: Provided, however, That he may go as passenger in first-class passenger vessels between Europe and any of the Atlantic ports of the United States north of the 30th degree of north latitude, and may travel in Europe not south of the 43d degree of north latitude, and may go as passenger by water along the Atlantic coast south of the 50th degree of north latitude and north of North Carolina, with liberty to touch at any of the ports on said coast.

6th. That in case the said person shall die by his own hand or act while sane, or in, or in consequence of, a duel, or by the hands of justice, or in, or in consequence of, violating any law of any nation, State, province, or municipality, this policy shall be null and void.

7th. That in every case where this policy shall cease and determine or become null and void all previous payments made hereon shall be forfeited to the said company, excepting that in case of forfeiture after three or more years' premiums have been paid hereon the company will purchase the policy and pay therefor its equitable value, provided the policy be duly surrendered to the company on or before the day of the lapsing of the same, which equitable value shall be determined by the company.

8th. That in case the said person shall die by his own hand or act while insane the amount of one-half of all the premium paid hereon

shall be returned to the party or parties in interest upon the surrender of this policy to this company, first deducting the amount of dividends paid and any indebtedness due the said company on account of or incident to this policy.

9th. That no agent of this company shall make any contract binding this company, nor alter or change any condition, nor waive the forfeiture of this policy.

10th. That no claim shall exist under this policy unless due notice and satisfactory proof of death shall be presented in writing to the officers of the said company, at their office in the city of New York, within two years after the death of the person whose life is hereby insured, which proofs shall consist of statements made under oath, which shall furnish full and complete answers to the questions contained in the blanks for proof of death furnished by the company.

11th. That if this policy shall be assigned written notice shall be given to the officers of this company at the city of New York.

12th. This policy shall be incontestable after five years from its date for or on account of errors, omissions, and misstatements in the application, except as to age of the party whose life is insured.

13th. That this policy shall —— be entitled to participate in the distribution of the surplus *pro rata* with the class to which it may belong.

In witness whereof, the said The Manhattan Life Insurance Company have hereunto affixed their corporate seal, and, by their president and secretary, signed and delivered this contract at New York, this 5th day of December, one thousand eight hundred and seventy-seven.

[L. S.] HENRY STOKES, *President.*
J. L. HALSEY, *Secretary.*

J. E. M. No. 34. Self policy. Ed. Jan., 1877. 1,000.

217 [Endorsed:] No. 42617. The Manhattan Life Insurance Co. of New York. Life of John M. Armstrong. Term of life. Date, December 5th, 1877. Amount, $6,000. Premium, 101\frac{34}{100}$. Payable semi-annually, Dec. 5th and June 5th.

218 DEF'DT'S EXHIBIT F, DEC., 1881. B. L. B.

The Provident Life & Trust Company, No. 108 So. Fourth street, Philadelphia. App'd, S. R. S.

Certificate of the physician who has personally examined the party to be assured, on behalf of the company, and who is earnestly requested to answer the following questions minutely, from a strict examination at the time, and to affix his signature thereto.

N. B.—This is considered entirely confidential. The examiner must have the application and family physician's certificate, both complete, and read them before making the examination.

Give full name and post office. Name, Jno. M. Armstrong; examined the 3d day of December, 18—; residence, nearest post office.

1. State the height, weight, shape of chest, measurement in inches

around the chest during forced inspiration and expiration, complexion and general appearance, what appears to be the general habits of life as to temperance, activity, &c. Height, 5 ft. 7 in.; weight, 135 lbs.; complexion, dark; shape of chest, symmetrical; measurement of chest, expansive; general appearance, healthy, reg.; general habits, temperate, active.

219 2. Are there any signs of internal or external affections of the head, or a predisposition to it; or of paralysis, convulsions, or any other disease of the brain or nervous system? No. See question 8 below.

3. What is the stethoscopic character of the respiration as to fullness, clearness, strength, ease, and uniformity over both lungs and freedom from unusual sounds, number of respirations per minute; is there any cough or expectoration? Normal. No.

4. What is the stethoscopic character of the heart's action as to clearness, force, regularity, and freedom from unusual sounds;
220 what is the character of the pulse and its rate per minute? Normal, reg.; 72.

5. Are there any signs of disease of the stomach, bowels, liver, kidneys, or urinary organs, or of hernia? See question 8 below. No.

6. Are there any physical or other signs of affection of the lungs, throat, heart, or larger blood vessels, or of any other important part or parts not included in the above question? See question 8 below. No.

7. Are there any signs of previous disease, or of mechanical injury? No.

8. Does applicant remember any symptoms of disease, or effects of injury formerly incurred? If so, what? No.

221 9. If a female, does she expect to be confined? How far gone, and how many children has she already had?

10. Is it a first-class risk? Yes or no? Yes.

11. If the risk is exceptional, but advised by you, give reasons? Urine normal.

Signature of the examiner.

THOS. WISTAR.

222 710 SANSOM.

PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.
Office No. 108 South Fourth Street.

Particulars required from the Person making Application for Life Insurance.

1. Name, residence, and relation of the person in whose behalf the insurance is proposed. If a married woman or a widow, state also her maiden name. Name, Benjamin Hunter; residence, 1304 So. 10th St.; relation, creditor.

2. Name, residence, and occupation of the person whose life is proposed to be insured. If a married woman or a widow, state also her maiden name. Name, John M. Armstrong; residence, 804 N. 17th St.; occupation, music typographer.

3. Place and date of birth. New York, Jan. 5, 1837.

4. Is the person whose life is to be insured married or single? Married.

223 5. Are his general habits of life now, and have they been, regular and temperate? Are they active or sedentary? Yes; active.

6. Has he been vaccinated or had small-pox; has he had the ordinary contagious disease of childhood? Yes; no; yes; measles in manhood.

7. Has he ever been afflicted with insanity, appoplexy, palsy, convulsions, congestion, or inflammation of the brain, or with determination of blood to the head? No.

8. Has he ever been threatened with consumption or suffered from scrofulous diseases, spitting of blood, habitual cough, and expectoration, shortness of breath, pain in the chest, palpitation,

224 or any other sympton of *of* affection of the heart or lungs? No.

9. Has he ever been seriously ill; has he ever been affected with or subject to typhoid, typhus, yellow, remittent, or intermittent fever rupture, piles, fistula, colic, cholera morbus, diarrhea, dysentery, or any particular complaint or disease whatever; what particular complaints or diseases and at what age? No; except measles as above.

10. Has he ever met with any serious injury, or one that required particular attention at the time or subsequently? No.

11. Has any near relative (including grandparents, uncles, and aunts on both sides) died of insanity, gout, comsumption,

225 cancer, scrofulous disease, disease of the heart, or any other hereditary disease, or had symptoms of the same? (State particulars, the relationship, resemblance, or otherwise to applicant, and age at death or when affected with these complaints. No. Ancestors on both sides to green age.

12. Has he resided in a tropical or otherwise unhealthy district of country or location at any time within the last ten years? If so, where, for how long a time, and with what effect upon health? No.

Are the parents of the party living? Their age and state of health? Mother living at 67, good health.

14. If deceased, at what ages, and of what disease did they die? } Father. Died when applicant was young. Exact cause of death not known. Mother.

226 15. How many brothers and sisters are living; their ages and state of health; how many have died, and at what ages and of what diseases respectively? One brother living in good health—he left home and his death is uncertain.

16. Is he now in good health and generally healthy and free from the influence of any circumstance which tends to shorten life or render its duration unusually uncertain? Yes.

17. Is there any other information respecting the health and habits of the party, or of any kind whatever, with which this company ought to be made acquainted, on account of the insurance asked for? No.

18. Is there any probability of a change in the occupation No.

227 19. Name and residence of the applicant's family physician or usual medical attendant; if he have none, then the name and address of an intimate friend, to be referred to for information required in physician's certificate. F. Sims, M. D.

Name also the other medical attendants whom he may have had within ten years, or for any serious complaint or protracted illness.

20. Has a proposal been made for insuring the life of said party to any company; and, if so, state what company, and for what amount, and whether it was accepted or declined? Insured by Economical.

21. Is the application for an insurance for life, or for a term of years, or for endowment, payable at a future age or on prior decease? Endowment, at 70.

228 22. For what amount? Ten thousand dollars.

23. Is it to be paid in yearly, half-yearly, or quarterly instalments? (Yearly preferable.) Quarterly premium, $——.

24. Are the premiums to be paid during the whole term, or in less number of payments? Annual.

25. Has the party carefully read the above questions and the certificate below, and is he aware that the policy may be vitiated and all payments made thereon may be forfeited by the intentional omission to state particular facts or other circumstances concerning diseases and injuries which he may have had, or be liable to, and that premiums must be paid on the day when there due? Yes.

The premiums on this policy are to be paid by Benjamin Hunter; business address, 128 N. 16th St.

229 I do hereby certify and declare my age on nearest birthday to be forty-one years, and that I am now in good health, and do ordinarily enjoy good health, and that in the above proposal I have not withheld any circumstance or information with which the said The Provident Life and Trust Company ought to be made acquainted touching my past or present state of health or habits of life.

And I do hereby agree that this declaration and the above proposal shall be the basis of the contract between me and the said "The Provident Life and Trust Company," and if any untrue or fraudulent allegation be contained herein or in the above proposal all moneys which shall have been paid on account of such insurance shall be forfeited to the said company, and the policy of insurance made on the faith of this declaration and the above proposal, shall become null and void and of none effect.

In witness whereof, I have hereunto subscribed my name. Dated this 3d day of December, 1877.

BENJAMIN HUNTER.
JOHN M. ARMSTRONG.

Witness present—
EDWARD G. ASHBROOK.

Endorsed: Deft's Ex. F., B. L. B., Dec. 6, '81. No. of policy 12993. Date 12 mo., 4, 1877. Jno. M. Armstrong. The above heading is to be filled only at the home offie.

230 DEF'T'S EXHIBIT H, DECEMBER 7, 1881. B. L. B.

THE STATE *vs.* BENJAMIN HUNTER.

Sur Indictment for Murder.

The evidence being closed counsel summed up to the jury. The jury retired, after being charged by the judge, with Constables Alfred Robinson and Samuel Shears, sworn, to attend them. After a short absence they returned into court, and being called all appear and say they have agreed upon their verdict, and by their foreman do further say they find the defendant guilty of murder in the first degree, as he stands charged in the indictment, and so say they all.

Whereupon the court, Richard S. Jenkins, Esquire, the said prosecutor of the pleas, then moved for judgment of the law, whereupon the said Benjamin Hunter, by George M. Robeson, Esquire, his counsel, moved that judgment be given for the said Benjamin Hunter, and that he be allowed to go without day, notwithstanding the verdict against him, which motion was denied by the court. And upon this it is forthwith demanded of the said Benjamin
231 Hunter, if he hath or knoweth anything to say wherefor the said court here ought not, upon the premises and verdict aforesaid, to proceed to judgment and execution against him, who nothing further saith unless as before he had said.

Whereupon, on the said ninth day of November of the said term of October, in the said year of our Lord one thousand eight hundred and seventy-eight, at Camden, in the county of Camden aforesaid, all and singular the premises being seen by the said court here fully understood, it is considered and adjudged by the court now here that the said Benjamin Hunter be securely kept in the jail of the said county of Camden until Friday the tenth day of January, in the year of our Lord one thousand eight hundred and seventy-nine, and on that day, between the hours of ten o'clock in the forenoon and two o'clock in the afternoon, he be taken to the place of execution to be provided by the sheriff of the said county of Camden pursuant to the statute in such case made and provided, and that he then and there be hanged by the neck until he be dead.

Sus. per call by the court.

G. S. WOODHULL.
232 JOEL STORMER.
ISAIAH WOOLSTON.

I, David J. Pancoast, one of the judges of the court of oyer and terminer in and for the county of Camden, in the State of New Jersey, do hereby certify that this is a copy of the record of the case of The State *vs.* Benjamin Hunter, in said court, duly certified under the hand and official seal of Joseph C. Hollinshead, who is the clerk of said court.

DAVID J. PANCOAST.

STATE OF NEW JERSEY, } ss:
Camden County, }

I, Joseph C. Hollinshead, clerk of the several courts for the county of Camden, do certify the foregoing to be a true copy of the verdict and sentence in the case of The State *vs.* Benjamin Hunter, *sur* indictment for murder in the court of oyer & terminer and general jail delivery for said county, as the same is of record in my said office in minute-book "D," page 551, &c.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this eighteenth day of November, A. D. eighteen
233 hundred and eighty-one.

[SEAL.] JOS. C. HOLLINSHEAD,
Clerk of the Courts.

STATE OF NEW JERSY, } ss:
Camden County, }

Be it remembered that I, William Calhoun, late sheriff of said county of Camden, in State of New Jersey, hereby certify that I was the sheriff of said county on the tenth day of January, anno Domino eighteen hundred and seventy nine, and that by virtue of my authority as sheriff, and pursuant to the order of the court of oyer & terminer of said county and with due form of law, and at the hour of eleven o'clock in the forenoon on the day and year last aforesaid, proceed- to execute the order of said court upon Benjamin Hunter, convicted in said court of the wilful murder of one John M. Armstrong, and sentenced to be hung, and that I did at the hour and on the day and date above named execute the order of said court by hanging the said Benjamin Hunter by the neck till he was dead.

In witness whereof, I have hereunto set my hand and seal
234 on this eighteenth day of November, anno Domini one thousand eight hundred and eighty-one.

WILLIAM L. CALHOUN, [SEAL.]
Late Sheriff.

Signed, sealed, and delivered in the presence of—
ELI B. MORGAN.

STATE OF NEW JERSEY, } ss:
Camden County, }

I, Joseph C. Hollinshead, clerk of the inferior court of common pleas of the county of Camden, do hereby certify that William Calhoun, whose signature to the foregoing certificate I believed to be genuine, was on the tenth day of January, A. D. eighteen hundred and seventy-nine, *was* high sheriff of the county of Camden, duly commissioned and sworn to execute the orders of the court.

In witness whereof, I have hereunto set my hand and affixed the seal of said county of Camden, this eighteenth day of November, A. D. eighteen hundred and eighty-one.

JOSEPH C. HOLLINSHEAD, *Clerk.*

235 (Endorsed:) *Sur* indictment for murder. The State *vs.* Benjamin Hunter. Copy. Certificate of the verdict sentence and hanging of Benjamin Hunter.

236 Circuit Court of the United for the Eastern District of New York.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,

vs.

JULIA ARMSTRONG, as Administratrix of the Goods, Chattels, and Credits of John M. Armstrong, Deceased, Defendant in Error.

Know all men by these presents, that we, The Mutual Life Insurance Company of New York, as principal, and Martin Bates, of Riverdale, New York, and George F. Baker, of 258 Madison Avenue, New York, as sureties, are held and firmly bound unto the above named Julia Armstrong, as administratrix, &c.; in the sum of twenty-four thousand dollars, to be paid to the said Julia Armstrong, as administratrix, &c., for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the seventeenth day of August, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas the above named plaintiff in error has prosecuted a writ of error to the Supreme Court of the United to reverse the
237 judgment rendered in the *the* above-entitled action in the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ROBERT A. GRANNIS,
2d Vice Pres't.
ISAAC I. LLOYD, *Sec'y.*
GEO. F. BAKER. [SEAL.]
MARTIN BATES. [SEAL.]

Sealed and delivered, taken and acknowledged by the said Martin Bates and George F. Baker, to me known to be two of the persons described in, and who executed the foregoing bond, this seventeenth day of August, 1882, before me.

[SEAL.] GHERARDI DAVIS,
Notary Public 109, *New York County.*

UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, City and County of New York, }

George F. Baker & Martin Bates, of the city of New York, being duly severally sworn, do depose and say, each for himself,
238 that he is worth the sum of twenty-five thousand dollars over

and above his just debts and liabilities, and exclusive of property exempt by law from levy and sale under an execution.

GEO. F. BAKER.
MARTIN BATES.

Sworn to before me, this 17th day of August, 1882.

[L. S.] GHERARDI DAVIS,
Notary Public (109), *New York County.*

UNITED STATES OF AMERICA, }
Southern District of New York, City & County of New York, } *ss:*

On this seventeenth day of August, in the year 1882, before me, personally came Robert A. Grannis, to me personally known, who, being by me duly sworn, did depose and say: That he resides in the city of Brooklyn, N. Y.; that he is second vice-president of The Mutual Life Insurance Company, of New York, the corporation described in and which executed the foregoing bond; that he knows the corporate seal of said corporation; that the seal affixed to said bond is such corporate seal, and was so affixed by authority of such corporation, and that he signed his name thereto by the
239 like authority as second vice-president of said corporation; that he knows the handwriting of Isaac I. Lloyd, who is the secretary of said corporation, and that the signature of said Isaac I. Lloyd, as secretary of said corporation, to said bond is genuine, and was also signed to said bond by like authority of said corporation.

Witness my hand and official seal, the day and year last aforesaid.

[SEAL.] GHERARDI DAVIS,
Notary Public (109), *New York County.*

Endorsed: Circuit court of the U. S., eastern district of New York. The Mutual Life Insurance Company of New York *vs.* Julia Armstrong, as administratrix, &c., of John M. Armstrong, deceased. Bond. Evarts, Southmayd, & Choate, att'ys for plaintiff in error. I approve the foregoing bond as to form and sufficiency. Dated N. Y., Aug. 17, 1882. H. T. Ketcham, att'y for d'f'd't in error. Approved Aug. 17, 1882. Chs. L. Benedict. Filed Aug. 17, 1882.

240 UNITED STATES OF AMERICA, }
Eastern District of New York, } *ss:*

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from (1) to two hundred and thirty-nine (239) inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Mutual Life Insurance Company of New York, plaintiff in error, against Julia Armstrong, as administratrix of the goods, chattels, and credits of John M. Armstrong, deceased, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to

be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this 10th day of October, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the said United States the one hundred and seventh.

[Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT, *Clerk.*

241 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The Mutual Life Insurance Company of New York, plaintiff in error, and Julia Armstrong, as administratrix of the goods, chattels, & credits of John M. Armstrong, deceased, entered the 14th day of August, 1882, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company, plaintiff in error, as is said, and as appears by its complaint: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17th day of August, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

[Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

[Endorsed:] Filed August 17, 1882.

242 UNITED STATES OF AMERICA, *ss:*

To Julia Armstrong, as administratrix of the goods, chattels, and credits of John M. Armstrong, deceased:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of New York in the second circuit, wherein The Mutual Life Insurance Company is plaintiff, and you are defendant, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 22nd day of August, in the year of our Lord one thousand eight hundred and eighty-two.

CHAS. L. BENEDICT.

213 [Endorsed:] Supreme Court of the United States. The Mutual Life Insurance Company of New York, plaintiff in error, against Julia Armstrong, as administratrix, &c., defendant in error: Citation. Evarts, Southmayd & Choate, attorneys for plaintiff in error. Due and timely service of the within citation is hereby admitted. Dated September 1, 1882. H. T. Ketcham, att'y for def't in error.

Endorsed on cover: E. New York C. C. U. S. No. 447. The Mutual Life Insurance Company of New York, plaintiff in error, *vs.* Julia Armstrong, administratrix of John M. Armstrong, deceased. Filed 21st November, 1882.

117-591

FILED
JAN 14 1886
JAMES H. McKENNEY
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885, No. 173.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

JULIA ARMSTRONG, ADMINISTRATRIX OF JOHN M. ARMSTRONG, DECEASED,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

EVARTS, SOUTHMAYD & CHOATE,
Attorneys for Plaintiff in Error.

JOSEPH H. CHOATE,
Of Counsel.

Supreme Court of the United States.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

AGAINST

JULIA ARMSTRONG, AS ADMINISTRATRIX of the goods, chattels and credits of John M. Armstrong, deceased,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

Brief for Plaintiff in Error.

This action was brought in the Supreme Court of the State of New York, for the County of Kings, on a policy of life insurance for $10,000, known as an endowment policy (p. 66), claimed to have been issued by this plaintiff upon the life of one John M. Armstrong, of Philadelphia. The defendant in error was his widow, and claimed to be his duly appointed administratrix. See letters (pp. 73–74).

One of the defences set up and attempted to be established was, that one Hunter was the real principal in the dealings with the company; that simultaneously with the

application for the policy Armstrong had assigned the policy to Hunter, who obtained the policy with the wicked and fraudulent intent of causing Armstrong's death and thereby obtaining the insurance; which death, with such intent, Hunter did shortly thereafter accomplish.

The facts disclosed by the evidence are as follows:

In the month of December, 1877, one Benjamin Hunter, entered into negotiations with this plaintiff for insurance, through their agents in Philadelphia, on the life of John M. Armstrong (p. 40), representing that he had an insurable interest in such life. He claimed to be a creditor of Armstrong's. Hunter then persuaded Armstrong to make application for this insurance to such agents. Armstrong did so (pp. 40, 41); he signed an application leaving the amount of insurance to be effected in blank; he also at the same time executed in duplicate an assignment of the policy, which was to be written in accordance with such application (Defendant's Exhibit A, p. 79, and Plaintiff's Exhibit G, p. 77). Armstrong's entire connection with the transaction began and ended with the making of the application.

Afterwards Hunter went again to the agents, stated that the amount in the policy was to be $10,000 (p. 42), and arranged to pay the premiums quarterly. This application was forwarded to the plaintiff in New York at its home office. Shortly afterwards Hunter again called on this plaintiff's agents in Philadelphia, said that he had called to pay the premium (p. 43), and, on learning that the policy had not yet been returned from New York, said that his lawyer would call for the policy when it was ready for delivery, and thereupon paid the premium, $138.60, and $1 for the policy. The policy afterwards was returned from New York, and, on December 12, 1877, Hunter's lawyer came in and asked for it (p. 43), and the policy, with the assignment attached, was delivered to him, and he took them away with him. That was the whole of the transaction.

At or about the same time Hunter, under very similar conditions, took out a policy on the life of Armstrong in

the Provident Life and Trust Company of Philadelphia (p. 77), for $10,000, and in the Manhattan Life Insurance Company (p. 85) for $6,000. The policy in the Provident Company was taken out in the name of Hunter; the policy in the Manhattan Company in the name of Armstrong, with an assignment to Hunter attached thereto. The amounts for which all these policies were issued were greatly in excess of the amounts for which Armstrong had been led to believe they would be issued (p. 38). They were as follows: Mutual Life, $10,000; Provident Life, $10,000; Manhattan Life, $6,000. His brother testifies (p. 50) that about the 11th or 12th of December, 1877, John M. Armstrong said to him: "Hun- "ter has had my life insured. * * * $2,500 in the Mu- "tual and $2,500 in the Provident, and I believe the Man- "hattan has rejected me."

Within six weeks after the issuing of these policies Armstrong was attacked at night on Vine street, Camden, and received blows on the head fracturing his skull, from the effects of which he died two days thereafter (p. 71). The plaintiff in error offered to prove that this murder was committed by Hunter, but the offer and evidence were excluded.

In the application for the policy in suit Armstrong answered in writing the following questions as follows: "Is "your life insured in any other company? If yes, give the "name of each company and the amount in each? Ans. "Provident, $2,500; Manhattan, $2,500. Have you made "any proposal or opened a negotiation with any person "for insurance upon your life in any company upon "which a policy has not yet been issued; if so, give the "name of each company, and the amount proposed in "each? Ans. No." (See Application for Insurance, between pp. 76 and 77).

And the company also set up as a defense to any action on the policy the falsity of these answers, which, if false, avoided the policy under the express stipulations thereof.

At the trial of this action the Court below made certain rulings and charges to which this plaintiff duly excepted, and for which it is

ASSIGNED FOR ERROR,

FIRST.—In that the Court received in evidence the policy, Plaintiff's Exhibit No. 1, without any proof that it had been delivered and refused to direct a verdict in favor of defendant below on the ground that there was no evidence whatever of any delivery of this policy to Armstrong, or to any one on his behalf.

SECOND.—In that the Court refused to receive evidence offered by the defendant below, to prove the acts of Hunter in obtaining this policy of insurance, as part of a fraudulent scheme which he subsequently carried out, in the course of which he obtained the policy in suit; also that Armstrong never knew of insurance effected on his life by Hunter, of $6,000 in the Manhattan Company, and of $10,000 in a third company, nor had any intent to have any such insurance, and never received the policies representing such insurance, and had no control or interest in them; and for that purpose the counsel for the defendant below asked this question of witness, *Walter* "If you had an interview with him [*i. e.* Hunter] "at any time that month, state what passed between "you and Mr. Benjamin Hunter, and what the date of "the interview was." The Court below excluded the evidence, saying, "I will exclude all evidence ex- "cept evidence that will defeat this contract. This "very contract, as between Mr. Armstrong and this "company at the time when it was made; that is, I do not "think it admissible to prove fraud in one transaction to "prove fraud like the one claimed in a similar transaction "between other parties. I think if you were going into the "whole case according to your first offer this would be ad- "missible as showing the conspiracy and fraudulent intent "of Mr. Hunter in the whole thing; but when I separate "this transaction and take Mr. Hunter out of it, so far as "his own rights are concerned, and leave it to stand on Mr. "Armstrong's as between him and his representatives on "one side and the company on the other, then I think you "must come right to the transaction between Mr. Arm- "strong and this company, or anybody else acting for Mr.

" Armstrong at the time this insurance was effected. In " that view I will exclude this evidence."

THIRD.—In that the Court refused to receive similar evidence on the offer of counsel to prove *conspiracy*, saying: "It is because I don't think conspiracy affects the case that I exclude it."

FOURTH.—In that the Court refused to receive the evidence of *Thomas Graham* offered to prove the whole defense as set up in the second defense in the answer stated exactly as therein alleged, saying: "I will take your " offer as broad as you choose to make it; that you offer " the testimony to prove that Hunter procured the appli- " cation for the policy on Armstrong to be made, and that " he did so for the purpose of having the insurance effected " and then disposing of Armstrong and then getting the " money. Take it as broad as that and I will exclude it."

FIFTH. –In that the Court refused to receive the evidence of said Graham offered by the defendant below to prove that shortly after the execution and delivery of this policy and in or about the month of January, 1878, said Hunter, being then the holder of the policy, murdered John M. Armstrong, whose life was insured thereby. That he (said Hunter) committed such murder with intent to thereby realize and collect from the defendant the amount of the policy in suit.

That before said Hunter applied to the defendant for the making of insurance upon the life of John M. Armstrong, which was afterwards made by this policy, he had conceived the fraudulent and wicked scheme of procuring such insurance to be made with intent shortly afterwards to cause feloniously the death of Armstrong, for the purpose and as the means of collecting and realizing the amount of the policy from the defendant, and that he procured the policy in suit to be issued and simultaneously assigned to him and to be delivered to him with that intent.

That at the time said Hunter paid the premium upon and received this policy from the defendant, he was re-

solved upon the execution of and was acting with intent to carry out the wicked scheme already stated, including the purpose of murdering Armstrong, in order to realize the amount of the policy, which he afterwards carried out.

That said Hunter, with a like intent to cheat and defraud the Provident Life Insurance Company, of Philadelphia, and the Manhattan Life Insurance Company of New York, at or about the same time, applied to those companies respectively for insurance upon the life of Armstrong, procuring the policies upon that life to be issued in the one case directly to him, and in the other case in like manner, through an assignment, as in this case, and received the same from those companies respectively, and paid the premiums thereon, such policies being in the one company for ten thousand dollars, and in the other for six thousand dollars, as a part of one and the same entire scheme of fraud to realize the money to become payable upon all the policies in the event of the death of Armstrong, by means of his murder, to be feloniously accomplished by said Hunter.

SIXTH.—In that the Court refused to receive evidence produced and offered by the defendant below, that in the Court of Oyer and Terminer, in New Jersey, or the Court having jurisdiction, in the month of November, in the year 1878, Hunter having been indicted for the murder of Armstrong in Camden, in that State, was brought to trial, and was convicted of the murder of Armstrong, and was sentenced to be hung therefor, and was hung accordingly.

SEVENTH.—In that the Court refused to receive evidence produced and offered by the defendant below, that said Hunter was, in the early part of the year 1878, guilty of the wilful murder of John M. Armstrong.

EIGHTH.—In that the Court refused to direct a verdict for the defendant below on the ground that the defense of breach of warranty had been clearly proved and established; in that the answers by Armstrong to question 7, in

the application, were false and untrue; and, upon such request ruled that there was evidence upon which the jury might find either way.

NINTH.—In that the Court refused to direct a verdict in favor of the defendant below on the ground that Armstrong's answer to question 8, in said application, was false and a breach of the warranty upon which the policy was issued.

TENTH.—In that the Court refused to direct a verdict for the defendant below on the ground that, upon the evidence, there was no contract between the company and Armstrong, but that the only contract was with Hunter, and that there was no pretense of any transfer from Hunter, or his personal representatives, to the plaintiff below.

ELEVENTH.—In that the Court refused to direct a general verdict for the defendant below upon the proofs.

TWELFTH.—In that the Court charged the jury as follows:

(1). A contract is not assignable, unless it runs to a man or his assigns.

(2.) The last part [of the policy] is not assignable. It runs direct to his personal representatives. The assignment did not carry that part.

(3.) The plaintiff on this proof is his legal representative. So by this contract, if he died before that day, the company promised to pay this plaintiff $10,000, unless this contract is defeated in some way. * * * * * * * * If Mr. Armstrong died before that day in December, 1897, his personal representatives would want the paper, would be entitled to the money. * * * * If Armstrong lived till that time, Mr. Hunter is to have the money, if he dies before that time, his administrator is to have it. * * * If Mr. Armstrong had died of some disease [before December, 1897], the administratrix would have called on Mr. Hunter for the policy, and would have been entitled to it. * * * * Mr. Armstrong died, or

was killed, that left the paper in the hands of Mr. Hunter; he was hung. The paper went to his executor. The promise had become perfected to Armstrong's personal representative. She, the plaintiff, was entitled to this policy then.

(4.) It belonged to her when she became appointed administratrix, and it was Mr. Hunter's executor's duty to hand it over, and she has got it and has produced it here, and it is all correct in that respect; provided it was completed by the company, its agents and officers, and passed over to Mr. Hunter, as a thing to be an operative policy of insurance. * * * * If it was, if the company understood they had got done with it, and made a policy of insurance in this form and handed it over, that is enough. * * * * And now the plaintiff has got it, and she is well entitled, if it is a valid instrument. * * * *

(5.) After you have passed these questions of the delivery and ownership of the policy, upon which I have instructed you, there is nothing against this contract nor against the plaintiff's right to recover, except these defenses which are set up in the answer (that is after you have passed this question of delivery), and made upon the proof that this was not a valid contract, because Mr. Armstrong did not state truthfully in his application for the policy.

(6.) Was it true that he was not insured in either one of those companies? If he had made application to be insured in those companies upon his life, and had been examined and accepted so that it was understood between him and the company that he was insured, or that he was to be insured to date from his application, so that as between him and the company it was so understood, that he was insured in those companies, both of them, from a day before that date, why, then, you may say that he answered correctly when he said that he was, although no policy had been written out.

(7.) You see all these policies date back to a day before they are delivered; they become perfected afterwards; but

when they are delivered they date back to the application or some prior date. Now if he had applied to those companies, and wanted to be insured in those companies; presented himself for insurance, and they had examined him as much as they had a mind to, and had accepted him and given him to understand he was to be insured, to take effect afterwards from a date before or on that date, then he might when they asked him, "Are you insured in any other company?" say, "Yes." I say you may consider that as sufficient evidence to warrant you in saying that that answer is true, and you can say it is not false, if such are the facts.

(8.) If they are not the facts, if his application had been rejected, or he had no ground for saying that there was an understanding between him and the company, that he was accepted as to being insured, then it is false, and the policy is to go for nothing.

(9.) You will remember there is some confusion in the evidence as to when these amounts of the Manhattan and Provident policies were put into the Mutual application.

(10.) If at the time he made those answers he had been accepted as to being insured in those companies at that time, and it was understood between him and the companies that $2,500 was to be the sum put into the application and the policies when they were made complete, so that he understood that as between him and the company that that was the way it would be, then he might answer just as it was understood to be.

If he had a right to understand so he might say so: "Manhattan $2,500. Provident, $2,500."

(11.) But if the insurance was complete and understood by him, between him and the company, that it was to be the larger sums in either or both, so that it was a larger sum, and he stated it smaller, then that would vitiate the policy; it would be false and untrue in that respect. That would end it.

(12.) Now, as to the eighth question in the application he answered "No." The point is, was that a true statement? * * * Now, if he made his application

to each of those companies, and they had examined him and accepted him and given him to understand that they accepted him as a subject for insurance for their company, so that according to that understanding the policy was to be made out, that would date back and cover that time; that was not false.

(13.) I leave it to you to say whether these answers are substantially in any respect untrue.

(14.) In that the Court left to the jury the question of the truth or falsity of the answers to questions 7 and 8 in the application.

THIRTEENTH.—In that the Court refused to charge as requested by counsel for the defendant below, as follows:

(1.) That the policy and every right of recovery under it was assignable by Armstrong.

(2.) That an assignment of it by him in the form of Defendant's Exhibit A, if made by him, would transfer to the assignee, Hunter, the right to recover in the event of Armstrong's death prior to the expiration of the time at which it was made payable to him.

(3.) That the clause in the policy, "or if he should die before that time, then to make said payment to his legal representatives," reserved no right to his personal representatives at his decease which would not be cut off by a valid assignment of the policy made by him in his lifetime.

(4.) That "legal representatives" used in that clause includes assigns.

(5.) That the insertion or addition of the words "or assigns" in that clause is not necessary to make the right to recover, in the event of his death before the day named, assignable by Armstrong in his lifetime.

(6.) That the entire policy, being one which by its terms was to pass to Armstrong's personal representatives in the event of his death, is therefore assignable by him in his lifetime.

(7.) That if the jury find that the assignment, Exhibit A, was signed by Armstrong, and left with the agents of

the company with authority to fill the blanks, as they were afterwards filled, and to deliver the same to Hunter with the policy, and that they were so delivered, it made Hunter the owner of the entire policy, and of any right to recover in the event of Armstrong's death before the time named.

(8.) That notwithstanding the form employed of a policy in the name of Armstrong, and an assignment simultaneously delivered from Armstrong to Hunter, if the jury find that the real contract made was between the company and Hunter, and not between the company and Armstrong the plaintiff (below) cannot recover.

(9.) That if the jury find that the company made no contract with Armstrong, the plaintiff (below) cannot recover.

(10.) That if the jury find that the policy was in fact made and issued for the benefit of Hunter only, the plaintiff (below) cannot recover.

(11.) That the plaintiff (below) having proved no assignment or transfer from Hunter, or from his personal representative, to her of the policy, or any right thereunder, can derive no right to recover from, by or under Hunter.

(12.) That if the jury find that there was no intent on the part of Armstrong to have or take any interest in the policy, the plaintiff (below) cannot recover.

(13.) That if the jury find that at the time of the death of Armstrong, Hunter was the holder and owner of the policy, the plaintiff (below) cannot recover.

(14.) That if the jury find that Armstrong signed the assignment and left the same with the agents of the defendant (below) with intent that they should fill the blanks, as they did fill them, they had authority to do so.

(15.) That if the jury find that Armstrong intended that the assignment, with the blanks filled as they were filled, should be delivered by the agents of the company with the policy to Hunter, they had authority to make such delivery.

(16.) That if the jury find that the answer made by Armstrong to the 7th question in the application, in respect to other insurance, was false in any particular, the plaintiff (below) cannot recover.

(17.) If the jury find that the answer made by Armstrong in the application, in respect to other insurance, was false, in that he had no other insurance in the two other companies named, or in either of them, or that his life was already insured in those companies, respectively, or in either of them, for more than $2,500, the plaintiff (below) cannot recover.

(18.) That if the jury find that the answer made in answer to the 8th question by Armstrong in the application, in respect to whether or no he was in negotiation for insurance upon his life in any other companies, insurances in which had not yet been effected, was false, the plaintiff (below) cannot recover.

(19.) That if the jury find that, at the time of making said application, either of the two companies named by him in his answer had been applied to for insurance upon Armstrong's life, and had approved the risk and agreed to insure him for more than $2,500, the plaintiff (below) cannot recover.

(20.) That if the policy was obtained by fraud, and by Hunter with fraudulent intent, the policy never became an operative instrument in any hands, and the plaintiff (below) cannot recover.

(21.) That in passing upon these questions of the truth or falsity of these statements, Armstrong's knowledge or understanding of them is immaterial. The question is as to the actual fact at the time.

(22.) That there is no evidence that the answer to question 7 was true.

FOURTEENTH.—In that upon motion duly made by the defendant in the Court below upon the pleadings, and all the proceedings theretofore had, and upon the bill of exceptions as settled, the Court refused to set aside the verdict and to grant a new trial of said action.

WHICH ERRORS ASSIGNED MAY BE SUMMARIZED AS FOLLOWS:

FIRST.—*The Court erred in that it held that the matters set forth in the answer as the second defense* (fols. 53–59) *constituted no defense to the action; and refused to receive evidence showing or tending to show the existence of a wicked and fraudulent scheme or intent in the mind of Hunter, at the time of the application for the policy, to procure the policy and then murder Armstrong for the purpose of obtaining the insurance money; which scheme was subsequently carried out; and the existence of which scheme, if established, the plaintiff in error claims should have been held to have rendered the policy void in its inception; and the Court erred in refusing to receive evidence of contemporaneous acts of fraud on the part of Hunter in his and Armstrong's dealings with other companies.*

SECOND.—*The Court erred in that it ruled that the policy itself was unassignable in part; and that the written assignment executed by Armstrong did not operate to divest his personal representative, the defendant in error, of her right to recover on the policy; holding that the agreement to pay the insurance money in case of Armstrong's death "to his legal representatives," was a designation in the policy itself of a particular class to whom, in any event, the money became due, upon the death of Armstrong before December, 1897; and that Armstrong's "assigns" were not included in such class.*

THIRD.—*The Court erred in that it held that under the evidence the answers to questions 7 and 8 in the application might both be true, or substantially true, and so charged the jury; and refused to direct a verdict for the plaintiff in error on account of the manifest falsity of such answers.*

First Point.

The application for the policy by Armstrong was at the instance and procurement of Hunter; its delivery was made by the company directly to Hunter; for his own benefit; with the assent of Armstrong, as expressed by the assignment executed by Armstrong simultaneously with the making of the application.

These acts constituted a contract between Hunter and the company, wherein Hunter, and not Armstrong, was the principal; and if such contract was induced or effected by Hunter's fraud, such fraud vitiated the contract.

There is no question or dispute in the proofs as to what were the facts of the dealings between the company's agent at Philadelphia and Hunter and the intestate. It appears that Hunter claimed to have an interest in Armstrong's life as creditor or otherwise, and on the 3d or 4th of December, 1877, called at the office of the agents of the company in Philadelphia (Lambert's testimony, fol. 122) and asked the rates on the life of a person 40 or 41 years of age; "he stated *he thought of insuring a person for his benefit* for ten thousand dollars;" on the 5th of December Armstrong came to the office and *stated "he came there at the request of Mr. Hunter* to make application for life insurance." Armstrong then went into the Examiner's room, signed the applications and the duplicate assignments in blank, and *left the office and never returned there again* (fols. 129–131). After he had gone the agent of the company found (fol. 128) that the application was incomplete, the amount of insurance not having been entered. Armstrong had left the amount blank. Hunter had stated the amount to be $10,000. Hunter came to the office the same or the next day, and being asked for what amount the application was to be filled, said, "*for the amount I previously mentioned*, ten thousand dollars."

At the same time Hunter stated it would be more convenient for him to pay the premiums *quarterly*, and on that account the words "quarterly" and "ten thousand dollars" were inserted in the application (fol. 130). The next step in the business was the sending of the application to the office of the company in New York. After this, Hunter called again at the office in Philadelphia. Lambert told him that they had not yet received the policy from the company. Hunter stated that, being about to leave the city, to be absent for some time, he had simply called to pay the premium, and that his lawyer had instructions to call later for the policy. *He then paid the premium and policy fee*, and went away. A few days later his lawyer (fol. 131) called, read through the policy and assignment, and took them away with him. Lambert says "*that ended the business*, so far as I can "now recollect.

"Q. Did Mr. John M. Armstrong ever call at the office "of the company, to your knowledge, in respect to this "entire business, except on the occasion that you have "stated?

"A. No, sir.

"Q. Did the company ever receive from Mr. Armstrong "any money or premium upon that?

"A. *None at all.*

"Q. *Did the company ever deliver to Mr. Armstrong "any policy or paper?*

"A. *No, sir.*"

In what seems to us the very novel view of the law which the learned Court below took of this case, this policy was *unassignable* in part; and it was chiefly upon the theory that the assignment to Hunter did not affect the title to the policy in the hands of Armstrong's administratrix, that the Court below excluded all evidence tending to show Hunter's fraudulent intent and designs, and his wicked and dishonest practices and dealings in the procuring of this policy to himself.

The second defense of this company's answer is set forth at pp. 16–18 (fols. 53–59).

Under the stipulation (p. 26, fol. 89), that either counsel

on the trial might read from the testimony taken on the trial of Hunter for the murder of Armstrong, the counsel for the company were, on the trial, proceeding to read the testimony of *Thomas Graham* (p. 51, fol. 147), when the learned Court requested to know what was counsel's proposition to prove. The Court then uses this language (p. 51, fol. 148): "I will take your offer *as broad as you chose* "*to make it; that you offer the testimony to prove that* "*Hunter procured the application for the policy on Arm-* "*strong to be made; and that he did so for the purpose* "*of having the insurance effected and then getting the* "*money. Take it as broad as that and I will exclude it.*" And upon the subsequent offers (p. 52) the Court made similar rulings, excluding the entire second defense and every part of it.

Now, we respectfully submit that the learned Court below erred in excluding this testimony and defense, and in the similar rulings throughout the trial; *for, whether the assignment would or could operate as a transfer of the policy or no, was wholly immaterial*, if the whole transaction was void in its inception.

The real principals were the company and Hunter; the *intent* of the parties was shown by the written documents, whether such documents became operative to pass title or not; and even without the assignment Hunter must have been held to have been the real party in interest.

Shilling v. *Accidental Death Ins. Co.*, 2 Hurl & N., 42:

> In this case the company had issued a policy on the life of one J. S. His administratrix suing upon the policy, the company set up in defense the plea that the insurance had in fact been effected by another for his personal benefit, and not for the benefit or account of J. S. This plea was held good, Chief Barron Pollock saying: "It appears that the policy *was not, in* "*fact*, the policy of the person whose name appears "on the face of it as being the person interested or "made for his benefit."

Rawls vs. *Am. Mutual Life Ins. Co.*, 27 N. Y., 287:

Wright, *J.*, says: "The defendants in form con-
"tracted with Fish for an insurance upon his life.
"* * I am inclined to regard the insurance as
"effected by the plaintiff on the life of Fish, *although*
"*the policy in form purports to have been procured by*
"*the latter.* The plaintiff applied for and obtained it
"as the creditor of Fish, to protect his interest as
"such creditor in Fish's life, *He took the initiatory*
"*steps for procuring the policy; the application stated*
"*it to be for his benefit; he paid the original and all*
"*subsequent premiums; it was delivered to him, and*
"*he sues upon it as the party in interest, and as the*
"*only party connected with the policy who could*
"*maintain an action upon it.* SO FAR AS THE QUES-
"TION OF ITS VALIDITY IS INVOLVED, IT WILL, THERE-
"FORE, BE TREATED AS A CONTRACT, IN SUBSTANCE,
"BETWEEN THE PLAINTIFF AND THE DEFENDANTS."

The Prince of Wales Ass. Co. vs. *Palmer*, 25 Beav., 605:

In this case the policy ran on the life of *Walter* Palmer issued on 31st January, 1855. On the 13th of of February, 1855, *Walter* assigned the policy to his brother *William.* On the 16th of August, 1855, *Walter* died under suspicious circumstances, and an inquest being held the coroner's jury found that *William* Palmer, did, feloniously, wilfully and of malice aforethought, kill and murder *Walter* Palmer.

William was afterward convicted of the murder of another person and hanged. *He was never tried for the alleged murder of his brother.*

The company brought suit to have it declared that the policy was fraudulently obtained, and that it was void and might be cancelled. The personal representative of the assured was made defendant. The Master of the Rolls says, p. 607: "I think the "evidence establishes that this was *William* Pal-"mer's policy *effected by him as part of a scheme* to "get large sums of money from various insurance

"offices. * * * I think that *Walter* Palmer "*never had any interest in the policy.* * * * I "am of opinion therefore that *the company is enti-* "*tled to have the policy delivered up to be cancelled,* "*and to have a declaration that it was obtained by* "*fraudulent means or for fraudulent purposes, and* "*that nothing is due on it.*"

Before the rulings of the learned Court below on the trial of this action, we had supposed that the principles of law for which we contend in this point were elementary and fundamental.

See also *Bliss on Life Ins.*, 2 Ed., § 17 and notes.

But again, on the theory even that the policy was in form unassignable, the simultaneous execution by Armstrong of an instrument of assignment has an important bearing on the question of the *character and intent* of the parties to the original contract. A consideration of the cases, cited above, plainly teaches that although the policy was on its face a contract between the company and Armstrong, yet the facts of the dealings of the parties would determine the nature of the transaction and the relation which the parties bore to one another: and applying these principles to the case at bar, we find Hunter to be the real principal, even without any assignment. And so, although the contract were not assignable in form, and the assignment itself as an instrument of transfer were valueless, it would still be conclusive *as determining the character of the original transaction.*

Ford vs. *Belmont*, 7 Robt., 97, 109:

"Where instruments simultaneously executed, re- "lating to the same subject matter, are for that "reason construed together, the general purpose of "the whole, apparent therefrom, will control the strict "construction or apparent purpose of one."

Citing *N. Y. Dry Dock Co.* v. *Stillman*, 30 N. Y., 176.

See also

Hills v. *Miller* and others, 3 Paige, 254.
Parks v. *Comstock*, 59 Barb., 16, 33.

And again, the method pursued in this case, of a policy to Armstrong, with an assignment simultaneously executed to Hunter, was in accordance with *the invariable rule and practice* of the company, where the *beneficiary* was a person *other than some relative* by blood or marriage of the person whose life was insured (pp. 49, 50; fols. 143, 144).

Second Point.

But even if Armstrong be regarded as the principal and Hunter only as Armstrong's agent, then whether or no the assignment could be considered as operative per se, *whether or no Armstrong in his lifetime parted with whatever title to the policy he ever acquired, yet if the contract was induced or effected by the fraud of Hunter it was void from its inception; and Armstrong could in no case have acquired any rights under it.*

The evidence of Armstrong's and Hunter's acts in the obtaining of the policy in suit is full, complete and wholly undisputed. There is not a single disputed fact in the case. Armstrong's name was in the policy, but it was Hunter who from first to last transacted all the business. He was either acting for Armstrong or for himself, and if in these negotiations he was simply the representative of his principal, Armstrong, then his fraud and his corrupt and wicked motives, designs and intents with which and by means of which he obtained the issuance of the policy, operated to defeat the transaction for the benefit of his principal.

The rule, the protection of which we claim, is founded on sound sense and sound policy. Can it be that there is any other safe and proper rule? Confessedly, Hunter, when he came to the office of the plaintiff in error to inquire about the rates of insurance, when he requested Armstrong to make the application, when he induced him to do so, when he afterwards called and directed the policy to be issued for ten thousand dollars (*instead of twenty-five hundred, as he had given Armstrong to believe would be the amount*, fols. 118, 145), when he again called and paid the premium and took away the policy, *had then formed the fraudulent and wicked intent to cheat and defraud the*

company by murdering Armstrong in six weeks' time after the issuing of the policy and claiming the money; and each and all of the steps to the possession of the policy were done or procured to be done by Hunter, "in pur- "suance and execution of a wicked and fraudulent "scheme and design on his part, which he wholly con- "cealed from the company, to cheat and defraud said "company by procuring said policy," &c. (Ans., fol. 57).

If we establish beyond all possibility of doubt or question the fraud of the agent in making the contract, must we bring that fraud home to the knowledge of the principal?

The rule is clearly otherwise, and most reasonably; *a different rule would merely result in a license for an easy method of swindling.*

This is so plain that the Courts have emphatically declared that whether or no the principals have knowledge of the fraud which tainted the contract is wholly immaterial. *If the contract was induced by the fraud of the agent, then, though the innocence and want of knowledge of the principal be indisputably and admittedly established, the fraud of the agent will be held to be the fraud of the principal.*

Bennett vs. *Judson*, 21 N. Y., 238.

"There is no evidence that the defendant authorized "or knew of the alleged fraud committed by his "agent, Davis, in negotiating the exchange of lands. "Nevertheless he cannot enjoy the fruits of the bar- "gain *wihout adopting all the instrumentalities em- "ployed by the agent in bringing it to a consum- "mation.*"

Natl. Life Ins. Co., vs. *Minch*, 53 N. Y., 144, 149.

"If the husband as the agent of the wife, procured "the policy by fraud, she cannot claim the benefit of "it, and be relieved from the consequences of the "fraudulent means by which it was obtained."

Proudfoot vs. *Montefiore*, L. 2 R. Q. B., 511.

This is a most interesting and instructive case. The

facts were these: The plaintiff in Liverpool employed an agent in Smyrna to buy on his account, and to ship and consign cargoes to him. The agent shipped a cargo and advised plaintiff on the 12th of January; on the 23d of January the ship sailed, but was immediately stranded, and the cargo became a total loss; the agent heard of the loss on the 24th, and on *the 26th. the next post day*, he wrote to plaintiff announcing the loss, but *purposely abstained from telegraphing in order that the plaintiff might not be prevented from insuring. Held*, that the plaintiff could not recover against the underwriters.

Chief Justice *Cockburn* distinguishes this case from *General Interest Ins. Co.* vs. *Ruggles*, 12 Wheaton, 408; and see also *Duer on Ins.*, Vol. II., p. 418.

Third Point.

The whole policy and every right and interest under it were assignable.

It will be noticed that this policy (Plaintiff's Exhibit No. 1, fol. 180, p. 66) was what is termed an *endowment* policy.

It provided for two contingencies.

first: that the assured should live until the 8th day of December, 1897.

second: that he should die before that time.

In the former case the amount of the policy became absolutely payable upon that date to the assured, "his exe- "cutors, administrators or assigns" (p. 67).

In the latter case the stipulation was "to make said "payment *to his legal representatives* within sixty days "after notice," &c.

Now, if this policy ever became operative as a contract of the company, it, and every right and interest under, it were assigned to Hunter by the assignment executed by Armstrong (Deft's Exh't A, p. 79), *unless the policy was non-assignable*, and the fact of such assignment, if operative, alone disposes of this case.

But the learned Court below divided this contract of insurance into two parts, and charged the jury that the assignment was operative to entitle Hunter to the money if Armstrong lived until December, 1897; *but that the assignment did not affect the right of Armstrong's personal representative, the plaintiff, to claim and take the amount of the policy if Armstrong died before that time; for that the words "legal representatives" amounted to a designa-*

tion of a particular class to whom the money should, in a certain contingency, be payable, which designation took from the assured the power of disposition.

It is useless to specify in detail the rulings of the Court on this subject. They infected the whole case. They occur in the first part of the charge (pp. 58 and 59) to every proposition in which the plaintiff in error duly excepted (p. 61). They also occur in the refusals of the Court to charge as requested (1–7, pp. 62, 63).

We respectfully submit that *there is not, and never was, a shadow of authority or a principle of law to support the rulings of the Court below on this subject.*

We respectfully submit that these words "legal representatives" used in an executory contract, are synonymous with the words "executors, administrators or assigns," and that *instead of making the policy unassignable, they perforce absolutely fixed its entire assignability;* and instead of divesting the assured of the power of disposition of the policy as a *chose* in action, they made it his absolute property to do with as he would.

We will not cite authorities to sustain the proposition that policies of life insurance, like other ordinary contracts, are assignable; that they are *choses* in action, and are governed by the same principles applicable to other agreements involving pecuniary obligations.

See *St. John* v. *Am. Mut. Life Ins. Co.*, 13 N. Y., 31.

See also *The Am. Law Register*, Dec., 1885, Vol. 24, p. 753, where the cases are digested.

Nor will we weary the Court by any review of those familiar cases where the law has been beneficently established that where one effects insurance on his own life for the benefit of his wife or children he is thereby prevented from subsequently altering the course of payment of the moneys payable under the policy after his death.

Those cases have their analogy in the principle of law which makes a voluntary settlement for the benefit of children *irrevocable.*

Those cases will probably be cited by the counsel for the defendant in error, in support of the rulings of the Court below. We will content ourselves with premising that they have nothing whatsoever to do with the question in dispute.

We have only to consider the effect of the use of the words "then to make said payment *to his legal representatives.*"

The learned Court below says that this was a special designation of Armstrong's administratrix as the particular person to whom on his death the money became payable. The absolute error of which proposition proves itself as soon as it is analyzed.

first.—A decedent's executor or administrator as such, takes *nothing* except by virtue of the office; and in his official character takes only as the representative of the decedent, *and for the purpose of administration only;* that is, of paying over and distributing among *the persons entitled thereto,*—what? *the personal estate of the decedent.*

second.—The executor or administrator cannot have any other power or function; *he, as such, cannot be entitled to any portion of the personal estate whatsoever,* except so much as he is permitted to retain for his services.

third.—He is the representative of the decedent to carry out his wishes *in the distribution of his personal property as expressed by will, or by the laws of the Commonwealth.* For such purposes, and with such end, and for such purpose only, he is the *personal representative or legal representative* of the decedent.

fourth.—*Only that property properly goes to him which belongs absolutely to the decedent;* and, therefore, that which is expressed as going to him must have been the absolute property of the decedent; and, if so, then the decedent in his lifetime had full power of disposition over it.

fifth.—But further, we respectfully submit that the term *legal representatives* is of even wider significance than the term *personal representatives*, which is usually used to designate the representatives of a deceased person. As to any particular *chose* in action payable to a man's legal representatives, who are they? The answer is plain. Those persons who, in operation of law or in the fulfillment of existing obligations, *stand in lieu of the original contracting party.* Can there be any question that a man's *assigns* are included among those persons? If A has an assignable contract with B which he assigns to C in a manner to bind B, is not C, so far as that contract is concerned, the *legal representative* of A?

sixth.—Again, supposing Armstrong not to have assigned this policy, but to have died a natural death within the twenty years, after having left a will *disposing of all his personal property*, is it not a *reductio ad absurdum* to state that this policy would not have been so disposed of? Even the learned Court below must have conceded that.

But whether it were disposed of or not would simply depend on whether or no it were part of the testator's personal estate. The executor would surely have been his *legal representative* after his death. Now, if this money were not part of the testator's personal estate, would the executor then have been entitled to the money payable under the policy? *Except in his capacity of executor*, to take it as the *legal representative* of the decedent and to dispose of it according to the directions of the will, *he could not be entitled to it, and consequently it must be that it was part of the personal estate of the testator*, the whole of which was disposed of by the will.

And yet the learned Court below held that making the policy payable to the *legal representatives* in the event of Armstrong's death was the designation of a class which took from Armstrong the power to divert the fund from that particular class; in other words, *that the contract was with Armstrong's administratrix as a person distinct from Armstrong*, which, of course, is a legal impossibility.

The Supreme Court of Massachusetts in the case of

Wason v. *Colburn*, 99 Mass., 342, fully sustains our argument.

See also *N. Y. Life Ins. Company* v. *Flack*, 3 Md., 341.

1 Bigelow's Ins. Rep., p. 146, where the head note is as follows:

"A provision in a life policy that the insurance "money will be paid to the personal representative of "the assured, is designed only to apply to a case where "the assured dies without having assigned the policy, "*and is not to be construed as limiting his power "over the same.*"

Fourth Point.

If a policy of life insurance once has a valid inception it may be assigned to any one, whether such assignee has an insurable interest in the life insured or not.

In the opinion of the learned Court below on denying the motion for a new trial, reported in 20 Blatchford, C. C. R., 493, considerable stress is laid (p. 498) on the fact that *no debt to Hunter is proved establishing an insurable interest.*

But no such question arose or was mooted at the trial, and the learned Court's charge (p. 58, fol. 162) is in direct conflict with his views expressed in the reported case.

" If Mr. Armstrong lived to that day in December, 1897, " Mr. Hunter would be entitled to the money."

And so, although we cannot think that a determination of this point of law is necessary for an adjudication upon the rights and liabilities of this company, on this writ of error, yet it is well to examine the question, when the law will be found to be as stated above.

It was proved that Hunter said he was *Armstrong's* creditor; it was proved that *Armstrong* said he was making the application for the insurance *at the request of Hunter* to secure him for some money he owed him.

What the *fact* of his indebtedness was, was not proven.

First.—But if the liability of the company is to be determined from the want of insurable interest in the assignee, the law of the State of New York must govern as being the *lex loci contractus.*

The policy was issued in New York, the contract completed there by the acceptance of the application, the premium and the loss made payable there—the only acts done in Pennsylvania were the mere ministerial acts of the agent in taking the proposal and delivering the policy.

The contract was, therefore, a New York contract, to be governed by its laws.

St. John v. *Am. Mut. Life Ins. Co.*, 2 Duer, 419.

The Junction Railroad Co. v. *Bank of Ashland*, 12 Wall., 226.

This principle was very ably and fully discussed by Judge Clifford in the U. S. Circuit Court for the District of Massachusetts, in

Desmazes v. *Mut. Benefit Life Ins. Co.*, 7 Ins. L. J., 926, and

Shattuck v. *Mut. Life Ins. Co.*, *id.*, 937.

SECOND.—And we respectfully submit that it is the established and unquestioned law in the State of New York that the assignee of a valid policy of insurance *takes title by virtue of his assignment and need not have or disclose any insurable interest.*

St. John v. *Amer. Mut. Life Ins. Co.*, *supra*, *Same case* affirmed by the Court of Appeals, 13 N. Y., 31.

Valton v. *Natl. Fund Life Ass. Co.*, 20 N. Y. 32.

In the latter case the head note is as follows: "One "who has a valid insurance upon his own life may "dispose of it as he sees fit, and it is immaterial that "the assignee has no interest in the life."

Olmstead v. *Keyes et al.*, 85 N. Y., 593:

The Court says, p. 598: "Like every other contract "to pay money, such a policy is a *chose* in action "with all the ordinary incidents of every other *chose* "in action. It is *abundantly settled* in this State, that "one who takes an insurance upon his own life may "make the policy payable to any person whom he "may name in the policy, and that such person need "have no interest in the life insured; and that if the "policy be valid in its inception, the party taking it "may assign it to any other person as he

"could assign any other *chose* in action, and *that the* "*policy will continue valid in the hands of the as-* "*signee, although he has no interest whatever in the* "*life insured.*" And page 600: "It follows, there- "fore, that one may, with the consent of the insurer, "deal with a valid life policy as he could with any "other *chose* in action, selling it, assigning it, dispos- "ing of it, and bequeathing it by will, and it has been "well said that if he could not do this, life policies "would be deprived of a large share of their utility "and value."

THIRD.—But it seems that the rule in Pennsylvania is not otherwise.

Bond vs. *Bunting*, 78 Pa. St., 210.
Estate of Malone, 9 Ins. L. J., 767.
Cunningham v. *Smith*, 70 Pa. St., 450.
Appeal of Elliott's Exrs., 50 Pa. St., 75.

Fifth Point.

The Court erred in rejecting evidence of contemporaneous acts of fraud on the part of Hunter, showing or tending to show the formation by him of a wicked and dishonest scheme, of which this swindling of the plaintiff in error was only a part.

The rulings of the learned Court below on this subject were so decisively expressed, and so clearly in conflict with what we deem to be well established law, that the plaintiff in error would, we submit, be entitled to a reversal on this ground alone.

See pp. 34 and 35, fols. 111, 112, and pp. 51, 52, 53 and 54.

And yet sufficient evidence of the contemporaneous acts of Hunter crept into the case, to authorize the Court to use this language, in deciding the motion for a new trial, 20 Blatchford, p. 494, "From the evidence received and "that offered, *it is to be taken that he died by the hand of* "*Hunter, who planned his death before the insurance, in-* "*duced him to effect it and make the assignment, paid the* "*first and only premium that was paid, and took his life* "*for the purpose of obtaining the money on this* AND "OTHER POLICIES."

The purpose of the counsel for the defendant upon the trial was to show the acts of Hunter *in procuring the policy with guilty and fraudulent intent:* and to show that intent, and also to establish, beyond all peradventure or question, that it was *Hunter and not Armstrong* who was the person who was effecting the insurance, and who was the real party in interest, it was competent to give proof of his and Armstrong's simultaneous and similar dealings with other persons.

Cary v. *Hotailing*, 1 Hill, 311:

Judge Cowen says, p. 316, "On questions of intent "to defraud, other acts similar to the offence charged "done at or about the same time, or when the same "motive to offend may reasonably be supposed to "have existed as that which is in issue, are admis- "sible with a view to the *quo animo*."

Bottomley vs. *United States*, 1 Story, 135:

Judge Story says, p. 143, "And in all cases where "the guilt of the party depends upon the intent, pur- "pose or design with which the act is done, or upon "his guilty knowledge thereof, I understand it to be "a general rule that collateral facts may be examined "into, in which he bore a part, *for the purpose of* "*establishing such guilty intent, design, purpose or* "*knowledge.*"

And see also

Castle v. *Bullard*, 23 How., 172, 186.
Butler v. *Watkins*, 13 Wall, 456, 464.

Sixth Point.

The Court was bound to give effect to that stipulation in the policy which constituted the statements of fact in the application for insurance warranties, and which rendered the policy void if either of them were in any respect untrue; and the Court erred in refusing so to do (fols. 155–6). And the charge to the jury in respect to the character and effect of the answers to Questions 7 and 8 in the application, and the refusals to charge as requested concerning the legal effect of the proof on this subject, were erroneous.

The clauses in the policy upon which we rely are as follows (pp. 66, 67).

> "The Mutual Life Insurance Company of New "York in consideration of the application for this "policy of insurance, which is hereby referred to and "made a part of this contract, and of each of the "statements made therein, which * * * every "person accepting or acquiring any interest in this "contract * * * *admits to be material*, and war- "rants to be full and true * * * "

Then follow the statements of further consideration and the undertakings of the company "*upon the following* "*conditions:*

> "I.—If any statement made in the application for "the policy be in any respect untrue, the considera- "tion of this contract shall be deemed to have failed "and the company shall be without liability under "it." &c.

Questions and answers 7 and 8 in the application were as follows:

> "Q. 7. Is your life now insured in any other com-
> "pany? If yes, give the name of each company and
> "the amount in each. A. Provident, $2,500; Man-
> "hattan, $2,500.
>
> "Q. 8. Have you made any proposal or opened a
> "negotiation with any person for insurance upon
> "your life in any company, upon which a policy has
> "not yet been issued? If so, give the name of each
> "company and the amount proposed in each. A.
> "No."

We confidently submit that *under the proofs it was impossible that both of these answers were true.*

The application to the *Manhattan* (Exhibit D, p. 79), was made on the 3d of December. It was for six thousand dollars although the amount of it was never mentioned to Armstrong (testy of Walter, fol. 114). There was no other insurance on Armstrong's life in the Manhattan Company but this. The policy itself (Exhibit E, page 85) was dated on the 5th and delivered to Hunter on the 8th of December, who then paid the first premium.

The application to the *Provident* (Exhibit F, p. 87), was also made on the 3d of December; and it was for ten thousand dollars, although Armstrong was not asked for what amount he would have the policy (as the negotiations were with Hunter, and Armstrong did state to the insurance agent, on being told the amount, that it was excessive, and that $2,500 was enough, p. 38, testy. Ashbrook, fol. 118). The policy itself (Exhibit No. 1, page 77) was dated on the 4th of December, and delivered to Hunter on the 6th, who then paid the premium (fol. 141).

These are the admitted and undisputed facts, and no amount of juggling with them can make them fit the answers to Questions 7 and 8, *supra*, so as to make such answers true, *and the Court was therefore bound to direct a verdict for the defendant below.*

(1.) Admit that Armstrong *thought* that he was applying for insurance of $2,500, in each of these two companies, yet the undisputed evidence of each company's representative is that the company dealt with Hunter and took its orders as to the *amount of insurance* from him only, and *in neither case ever contemplated any other insurance*; and as to the *Manhattan* it is proved that they never had any other insurance on Armstrong's life. (Testy. Halfol, 110.) Nor is any other insurance on his life in the *Provident* shown or suggested.

(2.) It is further established that at the time Armstrong made and signed this application to the plaintiff in error, *the applications to the other two companies had been completed* by the statement of the amounts of $10,000 in the *Provident* (fol. 228, and Testy. of Joseph Ashbrook, fol. 118), and of $6,000 in the *Manhattan* (fol. 213, and Testy. of Walter, fol. 112 and fol. 114. "I did not mention to "Mr. Armstrong the amount of this insurance in the "*Manhattan* Life" and Testy. of Carr fol. 115).

(3.) It is further established that at the time Armstrong made this application to the Mutual Life, the plaintiff in error, the *Provident* policy was written in form as it was subsequently delivered; and that the application to the *Manhattan* had been forwarded to the home office of that company in New York, and that its policy, which bears date on the same day (the 5th), had probably been then written in accordance with the application. (As to *Provident* fol. 119; as to *Manhattan* fol. 115, and fols. 109, 110.)

(4.) *And so if the applications as subsequently accepted by the companies previous to the actual delivery of the policies, and evidenced by their written policies, could be considered to be at that time their respective contracts of insurance, even then unquestionably Armstrong's answer of the amounts of insurance in each was false.*

(5.) But in fact it is clearly and affirmatively established that on this day (the 5th) *the policies of neither the* Provident *nor the* Manhattan *had been delivered nor the first premium paid; and it follows as matter of law that Armstrong was then insured in neither company for any amount whatsoever.*

The policy of the *Provident* was delivered on the 6th

and the premium then paid (Testy. Joseph Ashbrook, fols. 120, 154; Testy. Ed. G. Ashbrook, fol. 141.) The policy of the *Manhattan* was delivered on the 8th, *and the premium then paid* (Testy Walter. fols. 113, 114, Exhibit C, fol. 211, and Testy. Halsey, fol. 110); and it also therefore necessarily follows that his answer to question 8 was false.

First.—The contract of insurance in neither the *Manhattan* nor the *Provident* was complete until the actual delivery of the policy and the payment of the first premium.

Unquestionably the authorities on this point are seemingly conflicting or confusing, and yet we think that by careful examination it will be found that in most cases where a contrary doctrine is apparently maintained some special circumstances peculiar to the case under consideration have determined the decision of the Court.

The general principle, that a contract is not operative until delivery, has never been questioned; although the Courts have found parol agreements in insurance cases, and have construed less than the formal act to amount to a delivery.

(*a.*) The law on the subject we submit, in the absence of special circumstances, remains as we have stated it above.

Real Estate Mut. Fire Ins. Co. vs. *Roessle*, 1 Gray, 336. The Court says:

"The proceedings on the part of the defendant "were merely the initiatory steps to a contract. The "plaintiffs, pursuant to the defendant's request, had "prepared certain policies of insurance which *would* "*take effect as contracts on being delivered to the* "*defendant but not before.*"

Hoyt vs. *The Mut. Ben. Life Ins. Co.*, 98 Mass. 539. The Court says, p. 543:

"It does not appear *to have been understood or in-* "*tended by the parties that the contract of insurance* "*should be effected otherwise than by the receipt of* "*the premium and delivery of the policy,*" and holds

that, the policy never in fact having been delivered, no contract of insurance was made.

Markey vs. *Mut. Ben. Ins. Co.*, 118 Mass., 178, 194.

"*Where it is shown that the only form of contract* "*of insurance, contemplated by the parties was by a* "*policy issued by the Company upon the written ap-* "*plication of the insured, and there is no evidence* "*whatever that the Company intended or was under-* "*stood by the insured or the plaintiff to intend to* "*make a contract of insurance in any other form,* "*and the policy was not, in fact, delivered, the con-* "*tract of insurance was not completed.*"

See also the same case 103, Mass. 78.

Meyers vs. *The Liv. & London & Globe Ins. Co.*, 121 Mass., 338.

Judge Endicott says: "The plaintiff does not seek "to recover on the policy; and the evidence intro- "duced by him fails to show any oral contract to in- "sure on March 10, or the issue of any certificate "binding the company during correspondence. *The* "*insurance contemplated by the parties was by a* "*policy to be issued by the defendant, and to be* "*delivered to the plaintiff upon payment of the pre-* "*mium.* Such a policy was issued and the defend- "ant's agent notified the plaintiff that he had it. It "remained in the agent's hands * * * until a "few days before the fire, when it was cancelled for "non-payment of the premium. The presiding judge "correctly ruled that the action could not be main- "tained."

Heiman vs. *The Phœnix Mut. Life Ins. Co.*, 17 Minn., 153.

Where independent of the policy there is nothing to show any application for life insurance, or any agreement of insurance, the presumption is that, while there were negotiations, there was no contract and

no purpose to contract otherwise than by a policy made and delivered upon simultaneous payment of the premium. And see May on Insurance, 2d Edition, p. 56, § 56.

(*b.*) It is a familiar principle of the law of contracts that where parties enter into negotiations and correspondence looking to the subsequent entering into by them of a contract *by written agreement*, and this written agreement fails to be subsequently entered into, the preceding negotiations or correspondence will not be construed to amount to an agreement.

Ridgway vs. *Wharton*, 6 H. L. Cs., 238, 268.

"The question then, always is whether the parties "meant to embody the contract made by parol in "writing, *if they do, nothing binds them until it is* "*written.* If they enter into a contract with the view "to a written agreement, nothing will bind them but "a written agreement, and that quite independent of "the question of the Statute of Frauds, applying to "all agreements. And the plaintiff will be always "nonsuited if it appears that the parties were treating upon terms, and that they meant to embody those "terms in writing."

See also the case of *Lyman* vs. *Robinson*, 14 Allen, 242, 254, where the preceding case is cited with approval, and the Court says:

"*The circumstance that the parties had intended* "*a subsequent agreement to be made, is strong evi-* "*dence to show that they did not intend the pre-* "*vious negotiations to amount to an agreement.*"

(*c.*) But if these negotiations preceding the issuing of the *Manhattan* and *Provident* policies could in any case be construed to amount to an agreement of insurance before the issuance of the policies themselves, *the fact that the terms of the insurance were differently understood by Armstrong and these companies,*

would in itself prevent such contract of insurance from taking effect in behalf of either party.

Where there is a misunderstanding as to the terms of a contract neither party is liable in law or in equity.

Baldwin vs. *Middleburger*, 2 Hall, 176.
Cole vs. *Bowne*, 10 Paige, 526.

Utley vs. *Donaldson*, 94 U. S., 29, p. 47.

"Where there is a misunderstanding as to anything "material, the requisite mutuality of assent to such "thing is wanting; consequently the supposed con- "tract does not exist, and neither party is bound. In "view of the law in such case, there has been only a "negotiation, resulting in a failure to agree. What "has occurred is as if it were not."

(*d.*) Now there can be no question in this case that the *Provident* and *Manhattan* Companies each understood the amount of insurance applied for, and upon which they were to write policies at ten thousand and six thousand dollars respectively; and from the evidence of this *Mutual* application, either Armstrong stated the amount of the policies at $2,500 in each, *knowing such statement to be false*, or else he *misunderstood* the amount which the Manhattan and Provident Companies respectively had then undertaken to insure him in.

Either horn of this dilemma defeats all recovery upon the policy in suit.

(*e.*) Again, as to the Manhattan Company, it was specially agreed in writing by Armstrong on signing the application to *that* company (see page 82), as follows:

"And I hereby agree that the insurance hereby pro- "posed shall not be binding upon said company *until* "*the amount of premium, as stated therein, shall be* "*received by said company*," &c.

Second.—The law is well settled that the Courts will

give absolute effect to the stipulations of a policy such as the one under consideration, whether the same appear to be material to the risk or no, and whether the truth or falsity of the statement was known to the applicant for insurance or not.

Armstrong was undoubtedly misled, but that fact tended to mislead the companies.

Can we doubt that if he could have truly answered the questions thus, "I have applications pending in the Manhattan for $6,000 and in the Provident for $10,000," that the agents of the plaintiff in error would have noticed the inconsistency between Hunter's and his other statements, and this written answer in the application, and would have then consulted with the other companies, and that Hunter's fraud would have then been exposed?

It will be noticed that to neither the *Manhattan* nor the *Provident* had any statement been made of the application to the other. (Application to Manhattan, p. 81, Nos. 27, 28; Application to Provident, p. 90, No. 20.) By Armstrong's untruthful answers in the application to the *Mutual*, Hunter's scheme of fraud was perfected.

The doctrine here invoked is so well settled that it is hardly necessary to cite authorities on the subject; we will, however, call the attention of the Court to the language of Mr. Justice Hunt in *Jeffries* vs. *Life Ins. Co.*, 22 Wallace, 53:

> "The proposition at the foundation of this point is "this, that the statements and declarations made in "the policy *shall be true.*
>
> "This stipulation is not expressed to be made as to "important or material statements only, or to those "supposed to be material, but as to all statements. "The statements need not be representations even, if "this term conveys an idea of an affirmation having "any technical character. Statements and declara- "tions is the expression; what the applicant states "and what the applicant declares. *Nothing can be "more simple. If he makes any statement in the "application it must be true. If he makes any de- "claration in the application it must be true. A*

"*faithful performance of this agreement is made an*
"*express condition to the existence of a liability on*
"*the part of the company.*"

This positive declaration of the law is affirmed and reiterated in *Ætna Life Ins. Co.* vs. *France et al.*, 91 U. S., 510, where the Court further says:

"This decision is so recent, and so precise in its
"application, that it is not necessary to go back of it.
"It is only necessary to reiterate that all the state-
"ments contained in the proposal must be true; *that*
"*the materiality of such statements is removed from*
"*the consideration of a Court or jury by the agree-*
"*ment of the parties that such statements are ab-*
"*solutely true, and that, if untrue in any respect, the*
"*policy shall be void.*"

Seventh Point.

The judgment entered on the verdict should be reversed and a new trial ordered.

EVARTS, SOUTHMAYD & CHOATE,
Defendant's Attorneys.

JOSEPH H. CHOATE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

October Term, 1909. No. 125.

THE MUTUAL LIFE INSURANCE COMPANY,

Plaintiff in Error,

against

JULIA ARMSTRONG, as Administratrix of Sr., JOHN M. ARMSTRONG, Deceased,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

HERBERT V. KENNARD,

Attorney for Defendant in Error.

Supreme Court

OF THE UNITED STATES.

THE MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,

against

JULIA ARMSTRONG, as Administratrix, &c.,
of JOHN M. ARMSTRONG, deceased,
Defendant in Error.

Brief for Defendant in Error.

Statement of the Case.

The statement of the evidence in the brief for plaintiff in error is controverted as follows:

There was no evidence that Hunter "persuaded Armstrong to make application for" the policy in suit. Armstrong's conduct throughout was that of an ordinary applicant, who signed his own application for a policy and appointed the beneficiaries thereunder. Hunter neither asked, nor by the nature of the transaction, could have received any interest in the policy other than one subordinate, both in time and origin, to the interest first vested in Armstr ng and his appointees.

It is erroneously stated by plaintiff in error that Armstrong, at the time of signing the application, "executed in duplicate an assignment of the policy." Whether such assignment was executed, or authorized or sanctioned by Armstrong; whether it was delivered; whether, if delivered, it was not void for fraud, were all questions sub-

mitted to the jury upon evidence which will hereafter be specifically detailed and shown to be sufficient to support the verdict. Plaintiff in error inaccurately states that the policy was delivered to Hunter's lawyer. Lambert swears to delivery (p. 43, fol. 131); but Daniels, the lawyer, to whom Lambert claims to have made the delivery, being called by plaintiff in error, specifically contradicts the statement of Lambert (p. 49, fol. 142). Other facts of significance upon this hearing will best appear in the course of argument.

Points for Defendant in Error.

First.

Neither the assignment "Exhibit A" (p. 79, f. 210) nor its duplicate "Exhibit G" (p. 77, f. 204) was the act of Armstrong.

Proof, sufficient to sustain a finding, was submitted to the jury that he never executed either paper, never authorized their execution, and never made or sanctioned any delivery of either paper; that whether he gave any authority for the delivery or not, no delivery was made; and that any delivery, if made, was void for fraud.

I.—At the time of signing his application for the policy in suit, Armstrong dealt in private (p. 41, f. 125) with

Vanuxem, one of the agents for plaintiff in error, who died before the trial (p. 40, f. 122).

The record is silent as to any conversation between him and Armstrong.

The witness Lambert swears that after Armstrong's departure he found the application and two blank forms of assignment bearing the name of Armstrong in the same handwriting (p. 41, f. 125). The two forms of assignment bore the signature of Vanuxem as witness, and were left blank as to the *number of the policy*, the name of the *proposed assignee*, the residence of the proposed assignee and the day of the date (p. 41, f. 125).

Lambert further says that in both forms of assignment, the *number of the policy*, the name *Benjamin Hunter* in the space for the assignee, and the day of the date are in his (Lambert's) handwriting (p. 41, f. 126). This date was December 8th, and Lambert swears that the policy itself was not delivered to anybody earlier than December 12th (p. 42, f. 1277).

The witness left it not only possible, but plausible, that the papers were completed in violation of Armstrong's instructions, if any were given. Clearly no evidence in the case forbade the jury to find that the instruments were completed after the withdrawal of any instructions which Armstrong had given with regard to their completion.

Lambert received neither instructions nor permission from Armstrong to build up over the latter's alleged signature an assignment which the event has shown to be important and solemn. He received no directions to deliver such assignment. He proves no communication from Vanuxem as to the disposition of the papers, and for aught that plaintiff in error proves, if authority were given by

Armstrong it was for delivery to a person other than Hunter or for delivery upon conditions which were not complied with. One of these two papers was attached to the application, and remained in the hands of plaintiff in error until the present time (p. 42, f. 127). No delivery of *that* instrument is claimed. The other was produced upon the trial by defendant in error (p. 32, f. 106), whose position as administratrix of the supposed grantor forbade the theory of delivery by him. No proof whatever being given of the delivery of either paper, both were offered in evidence, and were met with the following objections and rulings:

"Counsel for the plaintiff objects to the admission of the "two papers offered, on the ground that they are immaterial, irrelevant and incompetent; that their execution "is not proved; that the papers bear intrinsic marks of "invalidity, and of the lack of execution and delivery; "that they show spoliation and alteration of their terms "since the day they appear to have been signed; and "that they were induced by fraud practised upon Arms-"strong by Hunter if they were executed.

"Objection overruled, and the papers *are received in "evidence as a part of the transaction according to their "legal effect*, and read in evidence."

This Court will readily see that the only conceivable motive for the introduction into this bill of exceptions by the Court below of these objections and ruling, is to certify that the questions of fact insisted upon by the objections were recognized in the ruling and reserved for the jury. The issues clearly defined by the objections above quoted were not only of legal necessity before the jury and must be assumed to have passed under their consideration, but the record demonstrates that they were *expressly* committed to the jury.

Among the fragments of the charge contained in the record is the following: "In this trial the facts in issue "are to be passed upon by the jury. I expect you to do your jury (*sic*) as jurors in passing upon such facts (p. 58, f. 161).

And the record after presenting the portion of the charge which met with exception proceeds: "The Court "charged the jury as to all other features of the (case) "fully, and in such manner that no exception was taken "thereto" (p. 61, f. 168).

The Court will also observe that the plaintiff in error by its 14th and 15th requests to charge (page 64, f. 174), recognized and confessed that the authority of Lambert to fill blanks in the assignment was an element of the deliberations of the jury.

II.—Again, even though there was evidence which constrained the jury to find that the completion of the paper, and its delivery were authorized by Armstrong, this verdict must be assumed to embrace in its general finding a conclusion upon conflicting evidence that no delivery, in fact, was made.

The only oral testimony as to delivery was given by the witnesses Lambert and Daniels, both called by plaintiff in error. Lambert's testimony was that at the request of Hunter he handed the assignment to Hunter's lawyer, (page 43, f. 130-131); but Daniels, identified by Lambert as the lawyer, to whom he claims to have made the delivery, by his testimony introduced into the case of the plaintiff in error, circumstan-

tially denies any delivery whatever to him (p. 49, f. 142). No attempt to prove a delivery to any person other than Daniels was made.

The assignment itself was upon the trial produced from the possession of the defendant in Error (p. 32, f. 106). An Appellate Court will not reverse the judgment which rests on a finding upon such evidence that the delivery was not shown.

In addition to the consideration already adduced to show that the jury passed upon Armstrong's relation to this assignment and its delivery, the 15th request to charge of plaintiff in error and the Court's disposition thereof may be quoted as conclusive upon the point.

"If the jury find that Armstrong intended that the as-
"signment with the blanks filled as they were filled should
"be delivered by the agents of the Company with the
"policy to Hunter, they had authority to make such de-
"livery."

"The Court refuses so to charge, except as already charged" (p. 64, f. 174).

III.—But could the jury have found that the completion of the paper and its delivery were authorized by Armstrong, they must have found that the paper, though delivered, was induced by fraud, practiced upon Armstrong by Hunter.

The plaintiff in error by its several answers, offers to prove, requests to charge, and present argument, makes

manifold assertions that from the issuing of this policy to the death of Armstrong, Hunter maintained the corrupt and fraudulent intent to secure the ownership of the policy, to murder Armstrong and collect the fruits of the insurance. The consummation of this scheme was manifestly impossible without the possession of an assignment from Armstrong of the policy.

An assignment obtained for the purpose of murder, and solely induced by the concealment of such purpose must be void for fraud. It will hardly be denied that the assignment was so induced, for the disclosure of the purpose would surely have arrested any delivery or permission for delivery on the part of Armstrong.

The allegations of fraud made by the Company cannot taint the *policy*, for that was a contract with Armstrong, whose innocence of a fraud upon the Company, which involved his own life, may well be conceded; and is not denied but these allegations, though useless to invalidate the policy, may well serve some useful purpose in this cause, for they unquestionably worked the avoidance of any executed assignment by Armstrong, upon the very ground which the attack upon the policy lacks, viz: fraud by a party to a contract by which that contract was induced.

The plaintiff in error cannot retract nor minify its own statements of fraud conceived and executed by Hunter and cannot complain that defendant in error, though not admitting the truth of these statements, seeks to apply them to the destruction of the assignment.

Either the statements of the answers in the case are true or untrue. If untrue the policy is valid in any hands as a contract free from fraud. If true, no assignment by Armstrong to Hunter could be valid.

Second.

(*In answer to First Point of Plaintiff in error*).

The proposition that the policy in suit was a contract between Hunter and the Company, and, as such, was void for Hunter's fraud, will not be entertained by this Court, since the verdict of the Jury has already been shown to embrace a finding that Hunter never took any relation whatever to the contract of insurance.

I.—In the face of such verdict, inquiry as to Hunter's conduct, intentions and transactions is manifestly immaterial for they cannot affect the policy if it be held that they did not bring him into relation therewith.

II.—But even upon the theory of a delivered assignment, the pretense that the contract was with Hunter offends the plainest principles.

The contract was in writing. By its terms it consisted of both the application and the policy. (Page 66, f. 180.)

The application was signed by Armstrong and not by Hunter. In it Armstrong designated his own heirs and assigns as the proposed beneficiaries. At the foot thereof he signed a declaration which, by the express printed terms of the application the plaintiff in error required to be "signed by the person in *whose favor a policy is applied for* and by the person whose life is proposed for insurance." The policy in its express terms is a "promise to pay to John M. Armstrong, his executors, administrators or assigns" in one event, and in event of death

to his "legal representatives" (page 66, f. 180.) It recites as consideration therefor, Armstrong's *own application* and the statements therein contained. It describes Armstrong's statements in the application as "the only statements upon which this contract is made." It is issued upon the condition that "the contract between the parties "hereto is completely set forth in this policy and the ap- "plication therefor taken together, and none of its terms can be modified * * * * except by an agreement in writing. (Page 67, f. 180.)

It is endorsed by plaintiff in error "Endowment Insurance upon the life of John M. Armstrong *in favor of himself*. (Page 70, f. 183.) Hunter is not named or referred to in the policy; nor is there any expression suggesting his relation thereto.

These facts present a contract, plain and unambiguous as to the identity of the parties thereto.

Armstrong and the company are demonstrated, in every expression, to be the sole contracting parties.

No suggestion to the contrary appears.

Extrinsic evidence cannot be allowed to vary these clear and well defined stipulations. Were this rule of construction doubtful, it would be gratifying to observe that the Mutual Life Insurance Company has set its seal upon an elementary doctrine of the law by embodying in the policy under examination an express condition that the contract between the parties thereto was completely set forth therein and could not be modified by parole.

III.—The authorities cited to sustain the contention that the contract was with Hunter, notwithstanding the terms of the instrument, are singularly distinct from the case at bar. The two English cases quoted arose under and obviously proceeded upon the Statute 14, Geo. III, known in England as the Gambling Act, which, in its material provisions, is as follows:

"Whereas it hath been found by experience that the making insurance on lives or other events wherein the assured shall have no interest hath induced a mischievous kind of gambling * * * be it enacted, &c., that no insurance shall be made * * * on the life or lives of any person or persons * * * wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by way of gaming or wagering."

Every assurance made contrary to the true intent and meaning thereof is declared void, and it is enacted that "it "shall not be lawful to make any policy or policies on the "life or lives of any person or persons * * * without "inserting in such policy or policies the person or persons "name or names interested therein, or for whose use, "benefit, or on whose account such policy is so made or "underwrote."

The defences available under this enactment and which were applied in the two cases referred to were :

1st. That a policy upon a life, in which the person for whose use or benefit, or on whose account it was made had no interest, was void.

2d. That any policy in which the name of the person interested in the life insured was not inserted was unlawful.

Neither the statute nor the decisions have any significance in a State to which the statute itself is a stranger; and it is apparent that the two decisions aforesaid introduced no change in the fundamental law for the construction of contracts, but were applications of the peculiar defences bestowed by the English statute.

The case of Rawls *v.* Am. Mut. Life Ins. Co. (27 N. Y., 287), will be found not to have changed the funda-

mental canon forbidding the variation of express written instruments. In that case the promise of the policy ran to Fish, the applicant for insurance, but was an undertaking to pay in the event of death *to the plaintiff Rawls*. It will thus be seen to have been a promise of which Fish could not avail himself, while the intention was clearly to make provision for Rawls.

Under the case of *Lawrence against Fox* (20 *N. Y., p.* 268), this promise of Fish for the benefit of Rawls would be enforceable by Rawls. And whatever may be said in this Court of the soundness of the case of Lawrence *v.* Fox, it was law in New York when the Rawls case was decided and controlled it absolutely. Indeed, when it is observed that unless Rawls could enforce the contract, the promise failed for lack of a promisee, the judicial duty to preserve the contract was plain. All that was involved in the decision was the construction of the contract according to its manifest intention.

The fallacy of the position assumed by the plaintiff in error is practically conceded in the declaration "that *although the policy was on its face a contract between the Company and Armstrong*," yet the facts would impose another and distinct contract.

IV—It is sought to maintain this pretence by resort to the familiar authorities which construe together instruments simultaneously executed.

In none of these cases was it sought to affect the terms of any contract by the construction with it of another, unless both were between the same parties. Indeed, careful research fails to discover any case where such an attempt has been made. The rule is invariable that the instruments to

be construed together must be (1) simultaneously executed; (2) refer to the same subject matter; and (3) be between the same parties.

If this element of the identity of parties is generally assumed and not recited in judicial discussions it is for the manifest reason that until this argument no attempt was ever made to merge contracts, the parties to which were not common.

In this case a contract appears which is justly described in the opposing brief as "a policy which was on its face a contract between the Company and Armstrong."

When it is sought to turn this contract found by the jury to have been delivered for the benefit of Armstrong's appointees therein named into a contract with Hunter, because Armstrong is claimed to have made assignment thereof to Hunter, the importance and propriety of the rule requiring that the papers to be construed together should be joined in by the same parties is well illustrated. The theory of the rule is that the several contracts of even date present the intention of the parties to each. Obviously the intention of each contract so far as consistent must be preserved in the result.

The assignment by Armstrong could have no force save by virtue of an antecedent delivery of the policy, for no assignment could be effective until the subject of assignment had existence. The preparation of the assignment itself manifested the intent that the policy should be initially a contract between Armstrong and the Company, for, otherwise, there could be nothing on which the assignment could operate. The very means by which the endeavor is made to change the express terms of the policy forbids its success.

Third.

(*In answer to Second Point of plaintiff in error*).

In its second point plaintiff in error seeks to avoid the policy by imputing Hunter's fraud to Armstrong upon the theory that Hunter was Armstrong's agent. This attempt to exalt the victim of a murder to the position of constructively plotting his own death is neither justified by any principle of law nor the pleadings or the evidence in this case.

I.—Fraud is an affirmative defence, whether personal or imputable.

N. Y. Code of Civil Procedure, Sec. 580.

The answer alleges no fraud whatever on the part of Armstrong.

II.—The evidence of Lambert, the witness for plaintiff in error, makes it clear that Hunter was acting for himself alone, and in bringing Armstrong and the Company to the point of a contract was *as much a broker for the Company as for the assured* (p. 40, f. 123; p. 44, f. 133).

III.—But by no principle of law could Hunter's agency, if it existed, have survived the point where the parties to the contract were brought into personal dealing.

Fourth.

(*In answer to Third Point of plaintiff in error*).

The assignability of a policy is an empty question where the jury has found, as we have in detail argued in the First Point (supra), that no assignment of the policy in suit was made.

Fifth.

(*In answer to Third Point of plaintiff in error.*)

Doubtless policies of life insurance are assignable. Assignment of the policy in suit was not impossible, unlawful or void; but no assignment by Armstrong could convey the interest vested in his legal representatives and now sought to be enforced. He who *owns* a right in action can assign it. Yet the opposing effort is to deduce from this rule that an insurance, because it is assignable, can be transferred by one who does not own it. The power of Armstrong to assign *his interest* in the policy is conceded, but was the promise of the Company to pay, in the event of death, any part of this interest?

Plaintiff in error recognizes the pivot of this question by its labored effort to demonstrate that the provision for payment in the event of death, was a *part of the estate of Armstrong* during lifetime.

Rights not in Armstrong were as much beyond his disposition as that of the veriest stranger.

We respectfully submit as the result of the authorities that the policy in question, so far as it contained assurance in the event of death, was an *irrevocable settlement*. The insurance when proposed was subject to Armstrong's complete right of disposition, and he could have preserved

the right of assignment. But when he directed its payment to his "legal representatives," he exhausted this right and parted with that which until then had been in his control. How many times must he be permitted to part with it to satisfy his right of disposition?

Plaintiff in error recognizes no escape, save to contend that as the representative ordinarily takes nothing except the personal estate of his decedent, Armstrong's settlement on his representative made the assurance his during his life.

The circuity of this argument appears in the following quotation from the opposing brief:

"That which is expressed as going to him (the represen-
" tative), must have been the absolute property of the de-
" cedent, and, if so, then the decedent in his lifetime had
" full power of disposition over it."

Well, it may be cautiously admitted, that if that which went to the one was really "*the absolute property*" of the other, then that other, if his property was *sufficiently absolute*, must have had a power of disposition over it, *at least* to the extent to which his *property was* "*absolute.*"

Against this it need only be shown to be legally possible for a representative to be vested with rights which were not a part of his intestate's estate, and this is shown both by reason and authority.

In many states the Statute gives to him a right of action against one who causes the death of his decedent. That right never inhered in the deceased, for it did not exist until he ceased to exist. Where one dies holding in trust the property of others by virtue of his office as executor, his representative is legally vested with the same until his decedent's successor is appointed.

Many illustrations occur that though the ordinary power of the representative does not extend beyond the estate of his decedent, no convulsion of legal proprieties would fol-

low his peaceful acquisition of rights which did not proceed from the deceased.

Among the citations in the opposing brief is Wason against Colburn (99 Mass. 342). The policy was an endowment payable to the insured, or in the event of death, to his "heirs or representatives." The Court held that the policy was in the control of the insured *only as to its endowment feature*, and the plaintiff in error would seem to appropriate this as a favorable authority, though the Court obviously referred to his control of the endowment only to introduce and contrast his relation to the death claim.

They said that "the policy was *primarily* intended to be "for the benefit of the *assured himself*, being *an endow-* "*ment policy* for the period of ten years. In case of his "decease within that period, it was made by its terms pay- "able to his heirs or representatives * * * "Upon his death intestate, within the ten years, his admin- "istrator, or his personal representative become entitled by "well settled principles of law to collect the amount due, "and hold it as part of the estate of the intestate."

In New York Life Insurance Company *vs.* Flack, (3 Md. 341), cited by plaintiff in error, the facts appear in the opinion as follows:

"Although it be true that there is a provision in the "policy binding the company to pay the legal representa- "tives of the insured, yet this obligation must be taken "*in connection with other portions* of the same instrument, "otherwise the true meaning *of the whole* would not be as- "certained. The contract is with the "*assured*, his exec- "utors, administrators and *assigns*," and at the bottom of "the policy are the words: 'N. B.—If *assigned*, notice to "be given the company.'

"Taking into consideration *the whole instrument* our "opinion is that the provision to pay to the legal represen- "tatives was designed to apply only to a case where the

"assured died without having previously assigned the "policy, and not to be construed as in any sense limiting "the power of the party insured to assign."

The distinctions between this decision and the case at bar are so wide that the contrast becomes the best authority for the non-assignability of the Armstrong policy. The necessity for construing the whole instrument clearly intimated that the conclusion would have been otherwise if the words "legal representatives" had not been qualified.

The quotation by plaintiff in error from Bigelow turns out to be the reporter's syllabus of the Flack case.

In *Worley* v. *N. W. Masonic Ass'n*, 13 *Rep.*, 233, it was held that a policy payable to devisees to whom ordinarily no property can go which does not "belong absolutely to the decedent," gave no right to the administrator. Surely, if the intestate had an estate in that policy it would have vested in the administrator.

In Gosling *v.* Caldwell, cited in Hines and Nichol on Assignments of Life Policies, page 95, the Tennessee Supreme Court disposing of a policy made payable to "legal heirs" held that the authorities were uniform that when the policy is issued the rights are vested and cannot be divested without the consent of those to whom they are secured, and the policy was held unassignable.

In Kelly *v.* Mann, 13 Rep., 12, a policy payable to legal representatives was held collectable by the administrator, not for the payment of debts, but to be distributed to the next of kin. This assurance was not a part of the estate before death, for, if it were, no reason could be found to exempt it from debts. Clearly, if the policy in suit could not be devoted to the payment of Armstrong's debts, he could not assign it in lifetime.

In Greeno *v.* Greeno, 23 Hun, 478, the insurance provided that the benefit might "be disposed of by last will "and testament; otherwise, &c." The insured left a will disposing of all his *personal estate*, as Armstrong is said to have made an assignment disposing of all his right in the policy.

The Supreme Court of New York, Fourth Department, citing authorities, says: "It follows from these authori- "ties that the insured in such a policy has no property or "estate in the amount payable in case of his death, that it "belongs to beneficiaries named in it, and would not, "therefore, pass under a will of all his estate, *for he had* "*none in it.*"

Sixth.

(*In answer to Fifth Point of Plaintiff in Error*).

No evidence of the contemporaneous fraud of Hunter upon companies other than the plaintiff in error was, as such, rejected.

The Court rejected *all* proof of Hunter's fraud, whether central to the transaction or collateral.

If the principal proof was properly excluded, no error was made in overlooking the incidental fraud.

No restraint was put upon proof as to either the authority to fill up and deliver the assignment of the policy or as to delivery of the assignment or as to Hunter's relation to the contract.

These issues having been fairly allowed and freely submitted to the jury, and the verdict having been taken that in many ways the assignment was inoperative, no injury was sustained by the exclusion of Hunter's fraud, for no fraud of his could taint a transaction to which he remained a stranger.

The same result follows if, as argued at length in Fifth Point, *supra*, the assignment, if executed and delivered, did not convey the claim payable to the representative.

Seventh.

In answer to Sixth Point of plaintiff in error:

There remains the defence based upon the alleged misstatements of Armstrong, in the application for the policy.

I.—The discussion of this defence may be simplified by showing that but one statement of Armstrong's is involved, namely, his answer "*Manhattan* $2,500," to the question "Is your life now insured in any other company?"

The original plea contained no defence based upon the answers in the application. The amended answer based a defence upon Armstrong's statement "Provident $2,500, Manhattan $2,500," but assigned falsity in but one particular, viz.: that he was insured *for a larger amount* than $2,500, in each company, The Provident Life and Trust Company of Philadelphia, and the Manhattan Life Insurance Company of New York.

The evidence disclosed that this statement was made by Armstrong on December 5th, and that no policy in either of those companies was then issued.

At the close of the evidence, the plaintiff in error seeing that the defence had failed inasmuch as the answer was not untrue in the single respect in which falsity had been alleged, amended its answer to conform to the proof, and for the first time alleged that the statement was false in that when the same was made, the applicant was not insured at all in the Provident Life and Trust Co. of Philadelphia, or The Manhattan Life Insurance Company of New York.

II.—The plaintiff in error now endeavors to draw into discussion an answer by Armstrong that he had not made any unsuccessful proposal for insurance to another company.

No allegation based upon this answer of Armstrong's was pleaded. The burden of proof was upon the insurer as to any inaccurate or false statement in the application.

The defence that Armstrong misstated his relations to other companies was an affirmative defence.

Piedmont *v.* Ins. Co., 92 U. S., 377.

The necessary corollary of this rule as to burden of proof is that the party holding it must specifically plead the issue on which he holds the burden.

This general rule is in New York statutory.

Code Civil Procedure, § 500.

True, the complaint alleged the due performance by Armstrong of all the conditions of the policy which was generally denied by the answer, but the allegation of the performance was surplusage, and as it tendered no issue, the formal denial raised none.

We cite a representative authority entitled to peculiar respect in this case, as it gave judicial sanction to the argument of the same eminent counsel who here maintains the contrary.

Murray *v.* N. Y. Life Ins. Co., 85 N. Y., 236.

The Court says:

"It (the complaint) alleged among other things, that the "death of the insured was not caused by the breaking of "any of the conditions and agreements in either of the "policies. The allegation was not required, and all that "was essential to make out a cause of action,, was a state-"ment of the contract, the death of the assured, and the "failure to pay as provided. The insertion of an unneces-

"sary allegation in the complaint which the plaintiff "was not required to aver or to prove in order to estab- "lish the case, could not and did not deprive the defen- "dant of his right to the affirmative, if such right actu- "ally existed. As the allegation referred to was not "properly there for the purpose of making out a good "cause of action, the complaint must be regarded as if it "contained no such averment."

It is respectfully urged that this Court will follow the case cited, as it regulates pleading and practice under a purely local statute of procedure.

III.—Plaintiff in error pleads that by the words "Provident, $2,500," Armstrong meant the Provident Life and Trust Company, of Philadelphia. No proof whatever was given that he was not insured in that company for that amount.

The plaintiff in error held the burden upon this issue, but was content with proving Armstrong's attitude as to the single policy issued to Hunter.

Non constat, but that Armstrong had another policy for $2,500 then in force in that company andt he verdict embraced this conclusion.

In face of a total absence of proof the verdict will be not disturbed.

The plaintiff in error is thus reduced to the answer "Manhattan, $2,500."

IV.—The construction of the policy shows that it is to be supported unless this answer was *wilfully* and *consciously* untrue.

The rule to be deduced from the authorities is that the answers of the applicant for insurance are to be submitted to the test of their intrinsic truth, only when the applicant

by some engagement, undertaking or covenant has pledged himself to their literal truth.

This seems to be the standard, whether the declarations are called statements, warranties or representations, for the assured has, in the language of many cases, made the declaration "the basis of the contract."

Where the statements are not vouched for as absolutely and subjectively true, they affect the validity of the insurance only to the extent to which they in fact induce the contract, for the applicant is bound not by an express engagement but by the general law of morals which governs every transaction, and his policy is not to be avoided save for statements, which are made with the knowledge of their untruth and the intent to deceive.

In one instance, deviation from existing fact is a *breach of contract*. In the other it is nothing unless fraudulent.

Moulor *v.* Am. L. Ins. Co., 111 U. S. 335, and cases cited.

The contract in this case is precisely within the rule established in Moulor *v.* Ins. Co.

The application and the policy taken together, as the contract requires, inconsistently characterize the answers of the applicant.

The application and the consideration clause of the policy contain phrases doubtless justifying the claim of warranty, but the insurance is made upon the condition that "if any "STATEMENT made in the application for this policy be in "any respect untrue, the consideration of this contract "shall be deemed to have failed, and the Company shall "be without liability under it." This condition, standing alone, could not be tortured to define Armstrong's answers to be warranties.

It is confidently submitted that the parallel between this and the Moulor case could not be more exact. Any argument would be but an appropriation of the opinion in that

case, though it may be remarked that the only authorities upon this subject in the opposing brief were there distinguished.

The record is barren of any proof of either Armstrong's intention to deceive or the Company's reliance upon his statement—nor could the jury have hesitated to conclude that the contract would still have been made if the Company well knew the existing facts.

No question was made, or can now be made, by the plaintiff in error but that Armstrong "did observe the ut
"most good faith towards it, and make full, direct and
"honest answers to all questions without evasion or
"fraud."

V.—The devices by which insurers seek to clinch their applicants with strict warranties have been so often reprehended as insincere, oppressive and iniquitous that no form of resistance will excite judicial hostility, even if it approaches in casuistry the considerations in support of the acknowledged abuse.

Against a candid defence counsel might hesitate to insist that the plaintiff in error has by, its policy, deliberately attested the truth of Armstrong's statements by the solemn word of *warranty*, for no analysis of the consideration clause of the policy can demonstrate but that the company, as a contracting party, bound itself by the covenant describing Armstrong's answers as statements "which, whether written by his own hand or not *every* "*person accepting or acquiring any interest in this con-*"*tract*, hereby WARRANTS to be full and true." (Page 66, folio 180.)

If standard words mean anything, has not this company digged a pit for its neighbor and fallen therein? If this interpretation is inconsistent with condition 1, the policy must be construed *contra proferentem.*

VI.—Armstrong's statement "Manhattan $2,500" was ambiguous and could only signify that he was insured by some insurer, whose name in whole or in part was "Manhattan." By no trade-mark or proprietory interest is the

name "Manhattan," secured exclusively to the single corporation referred to in the evidence, nor does the record put it beyond doubt that Armstrong must have meant this corporation, which, as judicial reports show, shares with scores of litigants this very common appellation.

The ambiguity was recognized by the plaintiff in error when in its answer, it eked out Armstrong's statement by this innuendo, "thereby meaning that his life was insured "in the * * * * *Manhattan Life Insurance Com-* "*pany of New York*" (p. 25, f. 86).

When a litigant who is not a favorite of the law, by his proof on an issue where he holds the *onus*, fails to resolve a doubt which he has introduced, he is without proof and cannot overcome a verdict against him.

Eighth.

No error is shown in the refusal to charge the requests of the plaintiff in error.

Only such parts of the charge as were the subject of exception are presented in the record (p. 58, f. 161).

Among these portions no instruction upon the propositions contained in the requests appear.

But the Court in portions of the charge not certified, "charged the jury as to all other features of the (case) "fully and in such manner that no exception was taken "thereto" (p. 61, f. 168).

Inevitably the substance of all the requests was fully and properly charged.

Ninth.

The judgment should be affirmed.

HERBERT T. KETCHAM,
GEORGE M. MACKELLAR,
Of Counsel for Defendant in Error.

117-591

MAR 17 1886

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 173.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

JULIA ARMSTRONG, ADMINISTRATRIX OF JOHN M. ARMSTRONG, DECEASED, DEFENDANT IN ERROR.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

JOSEPH H. CHOATE,
For Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

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BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

First. The slender thread upon which the whole argument for the defendant in error is strung consists of the assertion or suggestion many times repeated that some question in respect to the execution or delivery of the assignment of the policy to Hunter was submitted to the jury, and that the verdict embraces or involves some finding derogatory to that assignment or negativing its delivery.

(*a.*) But this is a wholly false assumption. No such question was submitted to the jury or passed upon by them in any form, directly or indirectly.

On the contrary, the whole tenor of the rulings and of the judge's charge was that as to the second branch of the contract in the policy it was not assignable, and that as to

that there was nothing for the jury to consider in relation to the assignment. It was the court and not the jury who, in respect to that branch of the contract, excluded from the case the assignment and the entire relation of Hunter.

But the proof of the execution and delivery of the assignment to Hunter was complete, and there was nothing to contradict it, and the Court, having admitted it in evidence, expressly instructed the jury that it operated to carry to Hunter all the interest in the policy which Armstrong could convey, which, however, he limited to the first branch of the contract.

The record will be searched in vain for any warrant for the assertion that any question in respect to that assignment was left to or passed upon by the jury.

The proof is that at the time of signing the application Armstrong signed the assignment, leaving blanks for the name and residence of the assignee, and delivered it, with the application, to the agent of the company. (Record, pp. 41, 145.) He also left the date blank, because the invariable rule of the company in such cases is to have the application and the assignment made together, and to have the assignment bear even date with the issue of the policy by the office in New York (p. 50). When the policy had been returned by the company to the agent he filled in the blanks (p. 41), attached the assignment, Exhibit A (p. 79), to the policy, and delivered the policy so attached to the person who called for it on behalf of Hunter (p. 43). There was a difference of recollection between the agent of the company, Lambert, who delivered it, and Daniels, Hunter's lawyer, who called and examined and approved it for Hunter after the latter had paid the premium, as to the identity of the person who actually received and took away the policy and assignment for Hunter (p. 49). But there was no dispute as to the fact of its delivery, nor was there any room for such a dispute, because it was attached to the policy, and at the outset of the trial (p. 30) "the counsel for the plaintiff admitted that the

policy in suit remained in the hands of Hunter from the day it was delivered down to Hunter's death, and was then found in the hands of his executor," and, in fact, after the presentation of the proofs of loss the defendant in error procured and presented to the company an assignment of the policy from the executor of Hunter to Mrs. Armstrong, and claimed that by that assignment it had become her absolute property (p. 31).

These being the proofs the Court could have left and did leave nothing to the jury as to the execution or delivery of the assignment to Hunter, but did positively instruct them (p. 58) "that if Armstrong lived to that day in December, 1897, Hunter would be entitled to the money;" that the delivery *to Hunter* was a sufficient delivery to make the policy operative; that it was proper that Hunter should keep it as long as he lived, and that on Hunter's death within the twenty years it was the duty of his executors to hand it over to the plaintiff.

The counsel for the defendant in error would have the Court imagine a finding which cannot be discovered in the record upon a question which could not have been and was not submitted to the jury.

(*b.*) It never was pretended on the part of the plaintiff in error that Armstrong was a party to Hunter's fraudulent scheme, but that his administratrix cannot avail herself of the fruits of that scheme, because to do so she must adopt it and all its instrumentalities.

In this aspect the assignment and the policy are inseparable. The defence is that the policy which the plaintiff seeks to enforce was void in its inception, because procured by fraud with intent to cheat the company out of its money—an intent sought to be consumated by the verdict and judgment appealed from.

Second. The counsel for the defendant in error in his

second point seeks to confuse and ignore the real nature of the transaction between the parties, as if there were first a policy completely issued by the company to Armstrong (as a wholly independent transaction) and afterwards assigned by him to Hunter, whereas there never was any policy issued to Armstrong. The method adopted, in conformity with the invariable rule of the company in such cases where the beneficiary was not a relative, was to have the assignment executed by the party insured, in whose name the policy runs, and delivered by the company, with and attached to the policy, to the assignee, *who was the real contracting party.*

There is no attempt here to alter or vary the terms of the policy by parole evidence. We only demand that the transaction shall be construed as it was, and as the documentary evidence shows it to have been.

The gambling policy act has no bearing to impair the application of the two English cases cited by us on this point. It rather intensifies their application.

In *Shilling, Adm'r'x,* vs. *Accidental Death Co.*, 2 H. & N., the agreement of the policy was with *James* Shilling to pay to his executors £2,000 on his death. The plea was that the policy was in fact made by *Thomas* Shilling in the name of James, but for the use and benefit of Thomas himself, and not for the use and benefit of James, and that Thomas, having no interest in the life, the policy was void under the statute. And the plea was held good. Of course, without the statute, a plea setting forth the same facts, and that the policy was procured by the fraud of Thomas with intent to cheat the company, must have been sustained, and there even without any assignment to Thomas.

In the *Palmer* case, 25 Brar., 605, although the assignment to *William* Palmer, the alleged murderer, by *Walter* Palmer, the party whose life was insured and to whom the policy was made payable, was not a simultaneous act as here, but was executed some two weeks after the effecting of the policy,

the master of the rolls was emphatically of the opinion that, wholly independently of the statute as to lack of interest, the company was entitled to have the policy canceled for fraud, because "it was established that William Palmer laid a deliberate plan for defrauding various insurance, and among others the plaintiff, the mode of accomplishing which was by effecting insurances upon the lives of persons who were in a great measure under his control, and then by precipitating by his own act the period at which those insurances were to become claims on the insurance offices."

The Court is not asked to vary the meaning of the policy by the assignment, but to determine the combined effect of the two instruments, executed simultaneously and delivered together to the assignee, as bringing him into direct relation with the company as the real party in interest, the real contracting party.

Third. It is idle to talk of an *irrevocable settlement* of the insurance money payable in the case of death by the party insured upon his *administratrix as such.* The counsel for the defendant in error claims this (Brief, p. 24) "*as the result of the authorities.*" But all his research has not produced a single authority in support of such an impossible proposition. There cannot, in the nature of things, be a settlement revocable or irrevocable by the party insured except upon some party who is distinct in law from himself, as his wife, his child, his creditor, his devisee, &c. But in law his personal representative is not distinct from himself; it is himself continued after death by a legal fiction.

The only case which *as cited* seems to lend any support to so strange an idea is the Iowa case of *Kelly* vs. *Mann*, 13 Rep., 12. But if the Court will look at that case as reported by authority in 56 Iowa, 625, it will be found to lend no sanction to such a proposition, for it there appears that the code of Iowa, § 1182, expressly provides that "a policy of

insurance on the life of an individual shall inure to the separate use of the husband or wife and children of said individual," independently of creditors, and by §§ 2371 and 2372 that the avails of any life insurance are not subject to the debts of the deceased, but shall in other respects be disposed of like other property left by the deceased, and this was why the Court held that the proceeds of a policy, payable in case of death to 'legal representatives,' was when collected by the administrator to go, not to the creditors, but to the next of kin.

The Tennessee case cited, *Gosling* vs. *Caldwell*, will also be found fully reported in 1 B. J. Lea, 454, and was controlled and decided by a statute of that State, which authorized a husband to effect a policy of insurance on his life which should inure to the benefit of his widow *and heirs*, to be divided between them according to the law of distribution, *free from the claims of creditors*. The policy made the sum insured payable after the death of the insured to his "legal heirs," and it was held to be different from an insurance payable to himself or "personal representative," which the Court expressly say he could have assigned or disposed of by will, "being part of the assets of his estate," but, being expressly payable to "his heirs," it was held under the statute to be secured to his children and grandchildren as heirs or next of kin, and was, therefore, not affected by an assignment made by him in his lifetime.

Fourth. In respect to the defense of breach of warranty all question of pleading was expressly and carefully excluded from the case by the Court by means of the amendments allowed. (P. 55.)

And it was demonstrated upon the evidence to a mathematical certainty that, at the time when Armstrong made the application, that as to the Manhattan and as to the Provident he was either not yet insured at all or, if at all, for more than $2,500, so that when he stated, in answer to ques-

tion seven, that he was then insured in each of those companies and for only $2,500 in each, and in the same breath, in answer to question eight, that he had not made any proposal or had any negotiation for insurance upon his life in any company upon which a policy had not yet been issued, one or the other of those answers must have been false, whether he knew it or not.

The suggestion that by "Manhattan" and "Provident" in his answer he did not mean the companies so named to whom he had already made written applications, both of which were in evidence (Exhibit AA, p. 80, and Exhibit F, p. 87), is a frivolous one.

The fatal error of the court below was in assuming that there was no breach of the warranty unless the answers made upon the application were willfully and consciously untrue and made with intent to deceive, which is also insisted on in the brief (p. 21), but here the warranty (Record, p. 3) is an *absolute* one, nor is it qualified by anything in any writing passing between the parties, as was the case in *Moulor* vs. *The American Life Insurance Company*, 111 U. S., 335. There are no inconsistent provisions here, and the case cited is wholly inapplicable, but the case at bar is governed by such cases as the *Jeffries* case, 22 Wallace, 53.

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